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GEORGE R. WALKER

GEORGE R. WALKER
COUNSELOR AT LAW
59 WALL STREET
NEW YORK

Law
K

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THE FOURTEENTH AMENDMENT AND SPECIAL ASSESSMENTS ON REAL ESTATE — NORWOOD *v.* BAKER, 172 U. S. 269.

Does the Fourteenth Amendment to the Constitution of the United States prohibit "assessments" on real estate in excess of special benefits, or by any other method than according to special benefits?

WHAT was decided by the Supreme Court of the United States in *Norwood v. Baker*¹ sufficiently appears in the following quotations from the opinion of the court (p. 290):—

"The statute authorizes a special assessment upon the bounding and abutting property by the front foot for the entire cost and expense of the improvement, without taking special benefits into account. And that was the method pursued by the village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost. . . . As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of special benefits."

The court therefore decided (pp. 291, 292):—

¹ 172 U. S. 269.

"The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one. . . . The present case is one of illegal assessment under a *rule or system* which, as we have stated, violated the Constitution, in that the entire cost of the street improvement was imposed upon the abutting property by the front foot, without any reference to special benefits."

The suit was brought by the plaintiff Baker in the Circuit Court of the United States for the Southern District of Ohio to enjoin the enforcement of such assessment, on the ground that it violated the Fourteenth Amendment to the Constitution of the United States. The Supreme Court on this point said (p. 277):—

"The plaintiff's suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the Fourteenth Amendment providing that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, as well as of the Bill of Rights of the Constitution of Ohio."

The following proposition was laid down by the court (p. 279):—

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation."

The Supreme Court expressly placed its decision upon the ground that the assessment violated the Fourteenth Amendment to the Constitution of the United States, saying (p. 296):—

"We have considered the question presented for our determination with reference only to the provisions of the national Constitution."

The court, however, added (p. 296):—

"But we are also of opinion that, under any view of that question different from the one taken in this opinion, the requirement of the constitution of Ohio that compensation be made for private property taken for public use, and that such compensation must be assessed 'without deduction for benefits to any property of the owner,' would be of little practical value if, upon the opening of a public street through private property, the abutting property of the owner, whose land was taken for the street, can, under legislative authority, be assessed not only for such amount as will be equal to the benefits received, but for such additional amount as will meet the excess of expense over benefits."

At the conclusion of its opinion the court announced its decision in the following words (p. 297):—

"The judgment of the Circuit Court must be affirmed upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation; and it is so ordered."

The Supreme Court of the United States in this case of *Norwood v. Baker* has thus distinctly held that it is contrary to the Fourteenth Amendment to the Constitution of the United States for a state, or a municipality within a state, to assess the cost of laying out a public street (including the cost of the land taken for that purpose) *by the front foot*, upon the land bounding and abutting upon such public street.¹

Assessments are made under the taxing power. This is stated by the court in *Norwood v. Baker* (p. 277):—

"But the assessment of the abutting property for the cost and expense incurred by the village was an exercise of the power of taxation."

So also Judge Cooley says:—

"That these assessments are an exercise of the taxing power has over and over again been affirmed until the controversy must be regarded as closed," citing a large number of authorities.²

¹ The far-reaching effect of this decision of the Supreme Court in *Norwood v. Baker*, if the principles therein stated are adhered to by that court and carried to their logical conclusion, can hardly be overestimated. The text of this article considers the general effect of that decision. A number of decisions have been made by other courts, in which the principles stated by the Supreme Court have been applied to particular statutes and cases arising under them. Thus, the Supreme Court of Texas in the case of *Hutcheson v. Storrie*, 92 Tex. 685, acting under the supposed compulsion of the decision in *Norwood v. Baker*, has held a front foot assessment invalid, and overruled its prior decisions which held similar assessments valid. Decisions holding statutes invalid which provided for assessments by front foot have been rendered in the following cases: *Loeb v. Trustees of Columbia Township*, 91 Fed. Rep. 37 (Ohio statute); *Fay v. City of Springfield*, 94 Fed. Rep. 409 (Missouri statute); *Charles v. City of Marion*, 98 Fed. Rep. 166 (Indiana statute); *Lyon v. Town of Tonawanda*, 98 Fed. Rep. 361 (New York statute).

When it is considered that many states have in a long period of years enacted a multitude of similar statutes authorizing assessments and in many instances the issuing of assessment bonds, the great importance of this decision of the Supreme Court in *Norwood v. Baker* is obvious, even if that decision be restricted in its application so as to embrace only assessments by the front foot. But such a restricted application seems inconsistent with the principles stated by the Supreme Court.

² Cooley on Taxation, 2d ed. p. 623. See, also, to the same effect, Dillon on Municipal Corporations, 4th ed. § 752.

It can hardly be supposed that the Fourteenth Amendment to the Constitution of the United States requires that all state taxes be levied only according to benefits received, and not in excess of benefits received, by the person or thing taxed, nor that an equal compensation be made for every tax levied. The Supreme Court has not so decided. Any such rule would render invalid all the ordinary *ad valorem* taxes as well as many others. Obviously, if any such rule of *quid pro quo* is to be applied in the case of assessments as distinguished from other taxes generally, there must be some distinction or line of demarcation between assessments and other taxes, and the Fourteenth Amendment to the Constitution of the United States must somehow make such distinction and line of demarcation. A tax may be defined as a payment or contribution required by the government to be made for public purposes. This definition is intended to include, and does include, an assessment as well as any other tax. Worcester defines tax as follows:—

“A sum imposed or levied by government or other authority; a rate; a duty; a tribute; an excise; an impost; an assessment; a custom.”

While Worcester's definition is correct, yet under our system of government a tax must be for a public purpose.

The taxing power necessarily involves and includes among other things the *power of apportionment*, that is, the power to choose the persons or things to be taxed, and to prescribe what amount or share each shall pay, or according to what rule or measure the amount or share to be paid by each shall be determined. It would be idle for a legislative body to enact that so many dollars tax be paid to the government, unless it also went further and prescribed what persons or things should pay the same, and in what amounts or according to what measure or rule. “Taxes cannot be laid without apportionment.”¹

Probably the first and chief impression which is produced upon the minds of most persons by the word “assessment” is that it is a contribution levied upon real estate *different* from the ordinary *ad valorem* contribution to which we are more accustomed and to which we ordinarily give the name of tax. Exactly what the difference is seems generally not much considered. There may also be, and doubtless usually is, associated with the word “assessment,” the idea that it is a contribution levied upon real estate because of some *special benefit* that is conferred or supposed to be conferred upon such real estate by some public improvement. So far, every

¹ *People v. Brooklyn*, 4 N. Y. 419, 427.

one will no doubt agree. It is necessary to consider, however, whether this reason, namely, special benefits, is one (*a*) which is addressed to the discretion of a state legislative body, or (*b*) compelled by a state constitution, or (*c*) compelled by the Fourteenth Amendment to the Constitution of the United States.

It is obvious that so far as this is a reason (*a*) addressed to the discretion of a state legislative body, it is one which neither the United States courts nor the state courts can enforce.

If, and so far as, this is a reason (*b*) compelled by a state constitution, it cannot be enforced by the United States courts except as a matter of state law, in a case where those courts have jurisdiction on other grounds, as, for example, that the case is one between citizens of different states. No federal question is presented by any supposed violation of a state constitution in this respect.¹

If this is a reason (*c*) compelled by the Fourteenth Amendment to the Constitution of the United States, then, in order that any rule based thereon may be intelligible or capable of enforcement, there must be some legal meaning and definition given to the word "assessment." In other words, if the Fourteenth Amendment prohibits assessments on real estate in excess of special benefits, or by any other method than according to special benefits, it is necessary to define what is meant by an assessment as used in such rule of prohibition. Observe that what must be defined is the word "assessment" *as used in such rule under the Fourteenth Amendment*. The question is not what the word "assessment" means as used in a state statute or in a state constitution, or in ordinary language without special reference to any statute or constitution.

We are considering in this article assessments by state legislative bodies. Hence we must keep in mind the nature and extent of the taxing power of the states. The persons and things that may be taxed by the states are almost innumerable, and new objects of taxation are constantly being found. Indeed, it is to be feared that the person who invents a new tax is looked upon by some persons as a public benefactor, rather than he who abolishes an existing one. Generally speaking, the states may tax all things except those few which are by the Constitution of the United States reserved for Congress alone to regulate and tax. Land and the improvements thereon are not among the things left by the Constitution of the United States to be regulated and taxed by Congress alone. The power to levy these state taxes of all kinds,

¹ Jackson v. Lamphire, 2 Pet. 289; Medberry v. Ohio, 24 How. 413; Salomons v. Graham, 15 Wall. 208; Spencer v. Merchant, 125 U. S. 345, 352.

by whatever name they are called (whether assessments or any other name), rests with the state legislative bodies, subject of course to any provisions of the state constitution.

It is probable that all state taxes are alike, so far as the Fourteenth Amendment is concerned, in this respect, namely, that any tax must be for a public purpose¹ (although I do not recollect any case in which the United States Supreme Court has decided that the Fourteenth Amendment invalidated a state tax levied for a private purpose); and alike in this also, that, so long as the purpose is public, a tax may be levied upon any or all of the persons or things within the jurisdiction of the State which are not reserved by the Constitution of the United States to be regulated and taxed by Congress alone. When the legislative body has prescribed the purpose of a tax, it must also apportion the tax, that is, designate the persons or things which are to pay the same, and prescribe the amount to be paid by each, or the rule or measure of dividing the amount among such persons or things.

An assessment such as the one in *Norwood v. Baker* is to be distinguished from other taxes in this, that it is apportioned according to a rule or measure different from that adopted in respect of some other taxes. The rule of apportionment in that case was the front foot rule. The court says that this rule is erroneous, because assessments must be levied according to special benefits, or at least not in excess of special benefits, conferred by the improvement the cost of which is paid out of the assessment. What the court holds invalid is the apportionment. The purpose of the tax was valid. The court, however, in laying down this proposition, does not define what it means by an assessment further than such definition may be implied from the facts of the particular case. The court, for example, does not say that all taxes on real estate other than the ordinary *ad valorem* tax are to be called assessments within the meaning of its rule deduced from the Fourteenth Amendment. Nor does the court otherwise define what it means by assessments. In other words, unless the word "assessment" has a definite legal meaning, the court, in saying that assessments must be apportioned according to benefits or not in excess of benefits, has not made clear what taxes must be so apportioned, for it has not defined assessments. It is necessary, therefore, to consider whether the word "assessment" has any definite legal meaning in which it may have been used by the court in laying down its proposition under the Fourteenth Amendment.

¹ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112; *Missouri Pacific Railway Company v. Nebraska*, 164 U. S. 403.

The courts in New Jersey have attempted to describe or define assessment in some such way as this, namely, that whatever contribution is levied on any real estate less than the whole of the real estate in a political subdivision of a state is an assessment; and they hold that such assessment must not be levied in excess of the special benefits received by the real estate upon which it is levied. Whether or not this is a good decision under the New Jersey constitution is a question with which we have at present nothing to do. Let us suppose, however, that some such distinction be attempted under the Fourteenth Amendment to the Constitution of the United States. In other words, let us assume for the sake of the argument that the Fourteenth Amendment prohibits any tax upon any real estate less than the whole of the real estate embraced in a political subdivision other than a tax according to special benefits, or a tax which shall not exceed the special benefits, derived by the real estate from the improvement to pay the cost of which the tax is levied. If this be a rule prescribed by the Fourteenth Amendment, then obviously it is a rule which must be enforced by the United States courts at all hazards, and which cannot be overriden or circumvented or abolished or in any wise affected by the constitution or statutes of a state. Let us suppose that while this rule is in force the legislature of a state undertakes to levy an assessment by the front foot, or by area, or *ad valorem*, or by some other measure than according to benefit, in a part only of a municipality. All that the legislature will need to do in order to accomplish this undertaking will be to erect the territory covered by the assessment into some sort of municipality, and then levy the tax, and then, presto, the tax will be good notwithstanding the Fourteenth Amendment, because it is a tax or assessment levied upon the entire real estate within the whole of a "political subdivision" of the state.

It has been decided in numerous cases in the Supreme Court of the United States that the matter of the creation and dissolution of municipalities or political subdivisions of the state is a matter solely for the constitution and statutes of the states.¹ The state governments, in the exercise of their proper functions, cannot be interfered with by the federal government. One of these functions is the creation and control of municipalities or subdivisions of the state for the purpose of carrying on the state government. Such subdivisions of the state are, so far as the federal government is concerned, mere agencies of the state. As the federal government

¹ See *Missouri v. Lewis*, 101 U. S. 22, and *Detroit v. Osborne*, 135 U. S. 492.

cannot interfere with a state in the proper exercise of its functions, so it cannot interfere with these subdivisions and agencies of the state. For this reason the federal government cannot even tax such subdivisions or agencies or their bonds or other obligations.¹ Much less can the federal government interfere with the states in the creation and dissolution of such subdivisions or agencies. Obviously, therefore, the definition of "assessment" on which certain New Jersey cases rest, when applied to the word "assessment" in the rule laid down by the Supreme Court in *Norwood v. Baker*, makes any supposed requirement of the Fourteenth Amendment that assessments be not in excess of benefits an illusory requirement, and one which can be circumvented and evaded by the states by the mere act of creating new and different municipalities or political subdivisions of the state.

Furthermore, so far as the Fourteenth Amendment is concerned, it will not help the definition any to say (as some of the New Jersey decisions do as a matter of state law, which we need not now criticise) that an assessment is a contribution levied in any *previously* created political subdivision of the state on any real estate less than the whole of the real estate in such *previously* created political subdivision; for all that the legislature of the state would need to do in that event in order to evade the supposed requirement of the Fourteenth Amendment would be first to create a new political subdivision, and then by a statute enacted a few days later make provision for the levy of an assessment or tax therein on some other basis than according to benefits, as, for example, according to front foot, value, or area. The customary and orderly procedure of the legislatures of the states is to make in the very statute creating a political subdivision full and adequate provision for taxes and assessments for the government and administration of the same and the performance of its functions. Any doctrine under the Fourteenth Amendment which involves the proposition that the power to levy assessments and taxes cannot be conferred upon a political subdivision of a state at the time of the creation of such subdivision, but must be in some later act, would certainly be strange and novel.

So, also, it is immaterial that the functions of the subdivision or taxing district of the state be many or few. This is a matter for the state legislative body to determine, subject only to such restrictions as the state constitution may impose. Furthermore, it

¹ *Pollock v. Farmers' Loan & Trust Company*, 157 U. S. 429, 583-586, and cases there cited; *s. c.* on rehearing, 158 U. S. 601.

would be idle for the Supreme Court of the United States to make any definition of assessment for the purposes of the Fourteenth Amendment based upon the distinction whether the taxes are levied upon the property in an entire political subdivision of the state, or only in a part of such political subdivision, without at the same time defining and stating what is meant by a political subdivision. It would be necessary, moreover, in order to have any such definition effective, that such subdivision be not subject to change at the will of the state.

It may possibly be objected that some of the considerations here set forth do not apply in the case of *Norwood v. Baker*, that it cannot be permissible for a state to create a political subdivision of the state or district of the state comprised only of the land of a single individual, such as the land of Baker. In other words, it may be suggested that the power of a state to create political subdivisions is limited by the United States Constitution. The contrary has, however, been repeatedly decided by the United States Supreme Court. Another answer to any such suggestion or objection is that the Supreme Court did not place its decision in *Norwood v. Baker* on any such ground, but placed it distinctly on the ground that the Fourteenth Amendment prohibited any assessment apportioned by the front foot, because such assessment necessarily excluded any inquiry in regard to the benefits received. No distinction was made or attempted to be made as to whether the title to the land assessed was in a single individual owner or in several owners. Indeed, it would be difficult to find any substantial legal ground for such a distinction. It often happens that large and valuable tracts of land are owned by a single individual. Thus, for example, in the city of New York certain well-known persons own block after block of valuable lands with numerous houses thereon. It cannot be that under the Fourteenth Amendment to the Constitution of the United States these blocks of land and the houses thereon cannot be assessed for a local public improvement precisely as well when the title is in a single individual as if the title were in several individuals. There is no legal or moral reason for any such discrimination. The assessment in *Norwood v. Baker* was made and apportioned according to well-recognized and long established usage. That this assessment was in no wise peculiar is shown elsewhere in this article. The street was constructed through certain land in the village and the cost assessed upon the abutting land. It was a mere accident that the owner happened to be a single individual.

An assessment, therefore, as that word is used in the rule or proposition decided by the Supreme Court in *Norwood v. Baker* cannot be defined as a contribution levied on some real estate less than the whole of the real estate in a political subdivision of the state, or in a previously created political subdivision of the state.

Neither can the word "assessment" as thus used be defined as a tax levied upon real estate other than an *ad valorem* tax; for what the Supreme Court has called assessments have been levied upon real estate *ad valorem* and have been held valid by that court.¹ Furthermore, an assessment *ad valorem* or a tax *ad valorem*, whichever it may be called, obviously violates the rule or proposition laid down by the court in *Norwood v. Baker*, for such an assessment *ad valorem* or tax *ad valorem* is necessarily not levied according to benefit, and may often be in excess of benefit, conferred upon the property taxed. The principle laid down by the court in that case, namely (p. 279), "the exaction from the owner of private property in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation," would condemn a tax or assessment *ad valorem* equally with a tax or assessment according to the front foot. An assessment within the meaning of the proposition stated by the court cannot, therefore, be defined as a tax levied upon real estate other than an *ad valorem* tax, for that proposition is inconsistent with any such definition.

If there is any other definition or attempt at definition of the word "assessment" as used in this rule or proposition of the Supreme Court under the Fourteenth Amendment, or any definite legal meaning which would be applicable to the word "assessment" in such rule or proposition, I have not been able to find it either in the decisions of the courts or in any of the text-books. So far as the Fourteenth Amendment is concerned, there is no distinction between an "assessment" and a "tax." No such distinction is expressed in the language of that amendment, or implied therein. If the Fourteenth Amendment deals with state taxation at all, it must deal with the genus tax and not alone with an arbitrarily named and undefined or undefinable species "assessment."

The examination of this case of *Norwood v. Baker* has proceeded far enough to show some of the questions and principles involved. Before examining it further, let us take a brief review

¹ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112.

of the history and purpose of the first section of the Fourteenth Amendment, and especially of the clause which provides:—

“Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

If we examine the history of the words “due process of law” in England, we find that they have had, generally speaking, no connection with questions of taxation. The words do not occur at all in Magna Charta. The thirty-ninth section of Magna Charta provides:—

“39. No free man shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or destroyed in any other manner, nor will we go upon him or send upon him, except by the lawful judgment of his peers or the law of the land.”

This section was copied in later English charters. It deals chiefly with the *liberty of person* of the subject. The form in which this section of Magna Charta appeared in the Articles which the Barons demanded of King John was as follows:—

“29. The *body* [*corpus*] of a free man shall not be taken, nor imprisoned, nor disseized, nor outlawed, nor exiled, nor in any other manner destroyed, nor shall the King go or send upon him by force, except by the judgment of his peers or the law of the land.”

When the charter came to deal with the question of *taxation*, the only limitation, generally speaking, was that contained in the twelfth section, to wit:—

“No scutage or aid shall be levied in our kingdom, *except by the Common Council of our realm*” (except the three regular aids).

This distinction continues all through the English constitutional history, and the only limitation placed upon the power of *taxation* is that taxes shall be levied by the legislative body, that is, Parliament.

The words “due process of law” appear for the first time in any of the great documents that form part of English constitutional history, in the Petition of Right to Charles I. In the 4th section of this Petition it is recited:—

“That in the eighth and twentieth year of the reign of King Edward III. it was declared and enacted by authority of Parliament that no man of what estate or condition that he may be should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death, without being brought to answer by *due process of law*.”

The statute, 28 Edw. III.,¹ referred to, is as follows:—

"No person shall be condemned without his answer."

"Item—That no man, of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by *due process of the law*."²

Another statute, Edw. III.,³ was as follows:—

"None shall be condemned upon suggestion without lawful presentment."

"Item—Whereas, it is contained in the great charter of the franchises of England that none shall be imprisoned nor put out of his freehold, nor of his franchises, nor free custom, unless it be by the law of the land, it is accorded, assented and established, That from henceforth none shall be taken by petition or suggestion made to our lord the King, or to his council, unless it be by indictment or presentment of good and lawful people of the same neighborhood where such deeds be done, in due manner, or *by process* made by writ original at the common law; nor that none be out of his franchises nor of his freeholds unless he be duly brought into answer and forejudged of the same *by the course of the law*, and if anything be done against the same it shall be redressed and holden for none."⁴

The Petition of Right also recited the 39th section of Magna Charta, above quoted, and then, in the 5th section, recited:—

"Nevertheless, against the tenor of the said statutes and other the good laws and statutes of your realm, to that end provided, divers of your subjects have of late been imprisoned without any cause showed; and when for their deliverance they were brought before your justices by your Majesty's writs of *habeas corpus*, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the lords of your Privy Council, and yet were returned back to several prisons, without being charged with anything to which they might make answer, *according to the law*."

The 7th section recites the condemnation of men by commissioners appointed to preside according to the justice of martial law. The petition prays, among other things, that no freeman in any such manner as is before mentioned be imprisoned or detained, and that the commissions for proceeding by martial law may be revoked, and no commissions of like nature thereafter issued.

¹ 28 Edw. III., c. III.

² 25 Edw. III., Stat. 5, c. 4.

³ Statutes at Large, p. 97.

⁴ 2 Statutes at Large, p. 53.

All this, it will be observed, relates to the *personal liberty* of the subject and to his security in the possession of his lands. But when the Petition of Right came to deal with the question of *taxation*, it referred to certain statutes, and then said:—

“By which statutes before mentioned and other the good laws and statutes of this realm, your subjects have inherited this freedom, that they should not be compelled to contribute to any tax, tallage, aid, or other like charge *not set by common consent in Parliament.*”

And then the next section recites that the people have been required to make forced loans, and that various other charges have been levied by lord lieutenants, deputy lieutenants, etc., against the laws and free customs of the realm. And in respect of *taxation*, the prayer of the petition is as follows:—

“They do therefore humbly pray your most excellent Majesty, that no man hereafter be compelled to make any gift, loan, benevolence, tax, or such like charge *without common consent by act of Parliament.*”

The Habeas Corpus Act of 31 Charles II., section 6, provides that no person who

“shall be delivered or set at large upon any *habeas corpus*, shall at any time hereafter be again imprisoned or committed for the same offence by any person or persons whatsoever, other than by the *legal order and process of such court,*” etc.

And other parts of the act use the words “due course of law.”

The Bill of Rights recites that King James and his ministers, etc., did endeavor to subvert the laws and liberties of the kingdom, among other things:—

“By erecting a Court of Commissioners for Ecclesiastical Causes.

“By prosecuting in the Court of King’s Bench for matters and causes cognizable only in Parliament; and by divers other arbitrary and illegal courses,” etc.

And the Bill of Rights then proceeds to declare, section 3:—

“That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious.”

It deals with matters of *taxation* in a separate section, and provides:—

“4. That levying money for or to the use of the Crown, by pretence of prerogative, *without grant of Parliament*, for longer time or in other manner than the same is or shall be granted, is illegal.”

The above quotations and references to the Great Charter, the Petition of Right, and the Bill of Rights show that, in the development of the rights and liberties of the English people, the only constitutional limitation placed upon the power of taxation was that it should be by act of the legislative body, that is, by Parliament, and that the words "due process of law" were used and applied only in reference to the liberty of the subject to have his person and property free from arbitrary seizure, etc., and did not have any proper application to the apportionment of taxes by the legislative department of the government.

In all the contests between the American Colonies and Great Britain, before the Declaration of Independence, the only complaint in regard to taxation was that the Colonies were taxed without representation in Parliament. The motto was, "No taxation without representation." It has always been assumed that if there had been representation in the legislative body, no complaint could or would have been made in respect of taxation or of the collection of taxes other than such complaint as might be addressed to the discretion of the legislative body by petition or otherwise. Thus, Mr. Chief Justice Fuller, giving the opinion of the court in *Pollock v. Farmers' Loan and Trust Company*,¹ says (p. 556):—

"The men who framed and adopted that instrument had just emerged from the struggle for independence, whose rallying cry had been that 'taxation and representation go together.'

"The mother country had taught the colonists, in the contests waged to establish that taxes could not be imposed by the sovereign except as they were granted by the representatives of the realm, that self-taxation constituted the main security against oppression."

The principles on which the clause as to due process of law in the Fourteenth Amendment of the Constitution of the United States should be construed are well stated by the Supreme Court in *Mattox v. United States*.² In that case it was held that the provision of the Constitution which required that the accused shall "be confronted with the witnesses against him" was not violated by permitting the testimony of witnesses sworn upon a former trial to be read against him. Mr. Justice Brown, giving the opinion of the court, said (p. 243):—

"We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guarantees of the rights of the citizen, but as securing to every individual such

¹ 157 U. S. 429.

² 156 U. S. 237.

as he already possessed as a British subject — such as his ancestors had inherited and defended since the days of Magna Charta.”

Judge Ruggles, giving the opinion of the New York Court of Appeals in the well-known leading case of *People v. Brooklyn*,¹ speaking of “those clauses in the constitution [of New York] which declare that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation,” says (p. 423): “Neither of these prohibitions applies to taxation.” This language of the learned judge was used with reference to the question of the power of the legislature to tax, including the power to apportion the tax. This is not stating that the words “due process of law” in the Fourteenth Amendment, or in similar provisions in the state constitutions, do not or may not apply to *proceedings for enforcing the payment of a tax*, such as action in the courts to obtain judgment for a tax and proceedings for the collection of the same, the seizure and sale of property to satisfy the tax, or the arrest and imprisonment of the person with a view to enforcing payment. Such proceedings may in some instances be judicial in their nature, and may require notice, hearing, and judicial decision. But even as to some of such proceedings summary seizure under a warrant does not violate the due process of law required by the Fifth Amendment to the Constitution of the United States or by the Fourteenth Amendment.²

Historically, then, it seems clear that the words “due process of law” found in the Fourteenth Amendment have no reference to the exercise of the power to tax, including the power to apportion taxes. The protection against unfair or excessive taxation is found in those parts of the constitutions of the several states and of the United States which assure a representative government, that is, a government in which the legislators are elected by the people. The historic requirement that there shall be no taxation without representation is thus fully satisfied.

It is not the proper course for the people to wait supinely until after the legislative body of the state or of any municipal subdivision of the state has imposed unfair or excessive taxes, and then, in order to prevent the taxes being levied and apportioned on the basis prescribed by the legislative body, appeal to the

¹ 4 N. Y. 419.

² *Murray's Lessee v. Hoboken, etc. Land Company*, 18 How. 272; *McMillen v. Anderson*, 95 U. S. 37, and cases cited. See, also, Judge Cooley's opinion in *Weimer v. Bunbury*, 30 Mich. 201 (1874).

protection of the Supreme Court of the United States, instead of electing proper legislators and appealing to the legislative body. Such conduct would proceed upon the theory that proper legislators cannot be elected, and that the legislative bodies cannot be trusted, and cannot even be properly influenced by the people, in the matter of the levy and apportionment of taxes, but that the United States courts and especially the Supreme Court constitute the protection of the citizen against unfair or oppressive taxation. This theory or assumption is not, however, in accordance with the history and spirit of our government and institutions, and it is not supported by the facts. The people of our country can be trusted. The citizens of our states as well as the members of legislative bodies of our states are as a rule naturally fair-minded, and it is not generally true that an appeal to them which is just is disregarded. There may be from time to time differences of opinion, but generally and in the long run a cause or an appeal that is in itself right commends itself to the citizens and the legislators, and is bound to succeed. If this be not so, and if the legislators of the country, or if the citizens of the country who ultimately are responsible for the kind of legislators who are elected, cannot be trusted to deal fairly and justly in the matter of the levy and apportionment of taxes, then our democratic government is in this important respect a failure. But the conclusion that it is such failure would prove too much, for it must be obvious that in the last analysis the Constitution and the Supreme Court itself are under the control of the citizens, and if they persistently desire the enactment of any particular legislation or the adoption of any particular policy on the part of the government, they have the power in the long run to have such legislation or policy adopted. There is no ultimate check but the people themselves.

Accordingly, we find that the courts have declined to interfere with the levy and apportionment of taxes by the legislative bodies, and have frequently stated that the proper remedy for unfair or excessive taxation is to appeal to the legislative bodies and to elect better men, if necessary, as legislators. Thus, Chief Justice Marshall, in *Providence Bank v. Billings*,¹ in a tax case on writ of error to the Supreme Court of Rhode Island, says (p. 563):—

“However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may

¹ 4 Pet. 514.

be abused ; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally. This principle was laid down in the case of *M'Culloch v. The State of Maryland*, 4 W. 316, and in *Osborn et al. v. The Bank of the United States*, 9 W. 738."

In the case of the *County of Mobile v. Kimball*,¹ the question was whether a tax to pay bonds for the improvement of the river, bay, and harbor of Mobile, levied solely upon the county of Mobile, and not at all upon the rest of the state of Alabama, which it was conceded would derive some benefit from the improvement, was a taking of property without due process of law. Mr. Justice Field, giving the opinion of the Supreme Court, says (p. 704):—

"It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay, and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expenses of the improvement, which was to benefit the whole state, among all its counties. But this court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive state legislation. The judicial power of the federal government can only be invoked when some right under the Constitution, laws, or treaties of the United States is invaded. In all other cases the only remedy for the evils complained of rests with the people and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests."

So, also, Chief Justice Shaw, in *Norwich v. County Commissioners of Hampshire*,² which was a petition for a *mandamus* to compel the county commissioners to build a bridge under a special act at the expense of the county, whereas under the operation of the general laws, without this special act, the expense would be borne wholly by the town, said:—

"It will not throw much light on a question like this to put extreme cases of the abuse of such a power to test the existence of the power itself. It is said that the expense of erecting bridges in one section of the commonwealth may be charged upon the inhabitants of another. . . . The possibility that such a power may be abused has but a slight

¹ 102 U. S. 691.

² 13 Pick. 60.

tendency to prove that it does not exist. There are a variety of other cases in which it would be easy to suggest a possible gross abuse of legislative powers, but in which there can be no possible question of the existence of the power itself under the express provisions of the Constitution."

The events that caused or occasioned the adoption of the Fourteenth Amendment also show that the view here presented is the correct one, namely, that the words "due process of law" were not intended to have anything to do with the levy and apportionment of taxes. This amendment was proposed to the legislatures of the several states by Congress on June 16, 1866, soon after the close of the civil war. The occasion and chief purpose of its adoption were the protection of the negroes in their newly created rights of citizenship, — rights such as had been enjoyed by our English ancestors and handed down by them and enjoyed by white persons in the United States. Most of the states already had in their constitutions the clause against depriving any person of life, liberty, or property without due process of law, which clause was enforceable in the state tribunals, and had theretofore been enforced, as to white persons; and the Fifth Amendment to the Constitution of the United States contained among other things a similar clause applicable to the United States government and enforceable in its tribunals. The Fourteenth Amendment had the effect of putting this guaranty and prohibition under the protection of the federal tribunals, in which could be sought redress for any violation of the same by the states as to white persons and colored persons alike. Neither the section itself, however, nor the history of its adoption, lends any support to the view that it was intended to lay down a new rule enforceable by the federal courts as to the method of apportionment of state taxes in the states. The section does not mention taxation. The words used in this section are the historic words which came down from Magna Charta and other statutes and documents in English constitutional history, and appear in the Fifth Amendment to the Constitution of the United States, and also appear in most, if not all, of the constitutions of the several states, and have historically no connection with the imposition of taxes. The protection afforded the citizen against unjust and oppressive taxation was found in other clauses of the Constitution, namely, those clauses which provided a representative government, and thus gave assurance that there should be no taxation without representation, and also in certain other clauses in the constitutions of the several states and of the United States which mentioned and undertook to deal with the subject of taxa-

tion. These words used in this section 1 of the Fourteenth Amendment to the Constitution of the United States have to do with the personal liberty of the citizen and the freedom of his property from arbitrary seizure; but not with the levy and apportionment of taxes. If these historic words were intended to be used in a new sense and to introduce a new constitutional prohibition as to apportioning state taxes, it is strange that the amendment did not expressly so state. As to the proper rule or principle to be applied in the construction of such a historic clause in the Constitution, see *Mattox v. United States*, *supra*.

Harry Hubbard.

195 BROADWAY, NEW YORK, January, 1900.

[To be continued.]

THE RIGHT TO LOCAL SELF-GOVERNMENT.

IV.

IN no state has this subject received so much judicial consideration as in Michigan. Let us examine therefore the reported cases in this state. The first is *People v. Mahaney*,¹ which affirmed the validity of an act establishing a Board of Police Commissioners for the city of Detroit. The opinion is by Cooley, J., and what he says on p. 500 is worth reading, because in later opinions we shall find how greatly his views changed.

The case of *People v. Hurlbut*² is an important one in our study of this subject. While the validity of the act in question was upheld (an act to establish a Board of Public Works), for the reasons and upon the grounds set forth in the opinion, that the appointment was temporary, the note is sounded that in later cases in this court led to the adoption of the principle of the right to local self-government. See the opinion of Christiancy, J., p. 66, and especially the extremely able opinion of Cooley, J., pp. 93-113. At p. 108 he sums up thus: "The state may mould local institutions according to its views of policy or expediency; but local government is matter of absolute right; and the state cannot take it away." To make this absolutely complete, let us rather put our proposition in this form: The state may mould local institutions according to its views of policy or expediency, either by general laws, or, at the request of the affected locality, by special act; but local government is matter of absolute right; and the state cannot take it away.

In *Board of Park Commissioners v. Detroit*,³ we find the principles enunciated by Cooley, J., in the last case bearing fruit. An act of the legislature creating a Board of Park Commissioners for the city of Detroit, the commissioners being appointed by the legislature, was held to be unconstitutional and void. The management of its public parks is the local concern of Detroit, and the legislature cannot interfere in it. Towns and cities, it is recognized, have certain rights to local self-government, even although the constitution be silent on the subject.

¹ 13 Mich. 481 (1865).

² 24 Mich. 44 (1871).

³ 28 Mich. 228 (1873).

The case of *Park Commissioners v. The Mayor*¹ is supplementary to the above case, and is to the same effect. In *Allor v. Wayne County Auditors*,² the question was what are the rights, powers, and duties of constables. It was held that in Michigan they are local peace officers, ministerial officers of justices of the peace, and bailiffs of courts of record of criminal jurisdiction in the county, and consequently an act of the legislature conferring upon the Metropolitan Police force of Detroit all the common law and statutory power of constables, except for the service of civil process, is, for these and other reasons, illegal and void. At p. 98 Campbell, J., said:—

“The police force is nothing more or less, so far as it is lawfully constituted, than an additional force of constables and watchmen appointed by the state for certain limited purposes; and unless some power exists in the legislature not only to add to the force of local peace officers, but to supersede them entirely for all common-law purposes, the provisions complained of in this statute cannot be maintained, if they are to be construed as respondents construe them.”

And at p. 101 he says:—

“Counsel on the argument very properly and very ably placed the right to redress chiefly on the ground that the rights and duties of constables were for many purposes recognized and fixed by our constitutional polity, and so connected with the course of criminal justice as to be beyond legislative annihilation. The argument, although dealing with very ancient affairs, in no sense belongs to mere antiquarian curiosity. It is very unfortunate and very discreditable that so little heed is sometimes paid to the continued and perpetual importance of institutions which form an essential element in the organic life of our government. Courts, at least, are bound to respect what the people have seen fit to preserve by constitutional enactment, until the people are unwise enough to undo their own work. The loss of interest in the preservation of ancient rights is not a very encouraging sign of public spirit or good sense.”

This is cited here as apposite, concerning the general ignorance of and indifference to our rights of local self-government and the danger we are in of losing them, through the encroachment thereon by the passage of bills creating state boards and state officers with jurisdiction over towns and cities, but without being accountable to them nor controllable by them, although these officers are to be paid by them, at the dictation of the political machine that may for the time being control the legislature.

¹ 29 Mich. 343 (1874).

² 43 Mich. 76 (1880).

Cooley, J., in *People v. Hurlbut*,¹ says, speaking of the constitution:—

“Instead of being the source of our laws and liberties, it is, in the main, no more than a recognition and reenactment of an accepted system. The rights preserved are ancient rights, and the municipal bodies recognized in it, and required to be perpetuated, were already existing, with known elements and functions. They were not towns or counties or cities or villages in the abstract.”

In Rhode Island, for instance, the constitution declares, Art. VI. sec. 1: “The senate shall consist of the lieutenant-governor and of one senator from each town or city in the state.” And Art. V. sec. 1, “Each town or city shall always be entitled to at least one member” (in the House of Representatives).

It is at once apparent that the sweeping principles stated as universal propositions of law, that towns are but creatures of the state and may be governed by the legislature as it pleases, in *Barnes v. Dist. of Columbia*,² *Merewether v. Garrett*,³ and *Met. R. Co. v. Dist. Col.*,⁴ all, it will be noticed, subsequent in date to *People v. Hurlbut* (1871), must be limited to the actual cases before the court, and cannot be accepted as stating a universal rule of American law. The influence and authority of the Supreme Court of the United States is weakened by such enunciation of *obiter dicta*.

Robertson v. Baxter:⁵ In this case *certiorari* was brought to review certain proceedings wherein the respondent, as drain commissioner, undertook to lay out a drain in the line of an old county drain, to build it through four townships, and to assess the cost of construction chiefly on the lands traversed and partly on the townships themselves and on a fifth township, not on the line of the drain, for public benefits at large. The court by Campbell, J., held that under the constitution of Michigan each township is a separate municipality, whose officers are elected by town residents and who are themselves residents. “It has always been understood that in providing, as it does, for the organization and incorporation of townships, the constitution dealt with them as recognized and ancient municipal bodies, the substantial character of which was intended to be perpetuated.” The court therefore quashed so much of the proceedings of the drain commissioner as were outside of his own town or township—for the words are synonymous.

¹ 24 Mich. 44, at 87 (1871).

² 91 U. S. 540 (1875).

³ 102 U. S. 472 (1880).

⁴ 132 U. S. 8 (1889).

⁵ 57 Mich. 127 (1885).

The case of *Atty.-Gen. v. Detroit*¹ turned upon the constitutionality of an act of the legislature providing a board of commissioners of registration and election for the city of Detroit. The act was declared to be entirely invalid because of the illegality of the creation of such a board with the powers conferred upon it by the statute, and particularly because of the illegality of the requirement that the board should be composed of equal numbers of two political parties only. Before arriving at this conclusion the court, by Campbell, J., said: "It is also well settled that our state polity recognizes and perpetuates local government through various classes of municipal bodies whose essential character must be respected, as fixed by usage and recognition when the constitution was adopted." Under this principle it was held to be unlawful to create substantial or serious differences in the fundamental rights of citizens in different localities, in the exercise of their voting franchises.

It is submitted, as a fundamental principle of American constitutional law, that the essential character of towns and cities, as fixed by usage and recognition when the respective state constitutions were adopted, must be preserved by our courts, except when the legislature makes changes therein at the request of the locality or with its consent.

The case of *Wilcox v. Paddock*² was upon a petition to quash proceedings for the appointment of a special commissioner under an act of the legislature authorizing such appointment, said commissioner to have power, if in his opinion it is necessary and for the good of the public health that the channel of Maple River, in four townships named, should be improved, to cause a survey to be made and to assess the costs and benefits, subject to the decision of a board of review. These proceedings were declared to be without authority of law, unconstitutional and void, and were therefore quashed, among other reasons, the court, by Morse, J., stating the law complained of "is an encroachment upon the right of local self-government. The taxes are assessed by the commissioner, and, although paid to the township treasurer, are held subject to the orders and disbursements of the commissioner. The act undertakes to wipe out county lines, and confer sovereign authority upon an officer selected by a probate court in another county. The local authorities of Clinton County, or of the township of Essex, have no voice or power in the matter. The whole

¹ 58 Mich. 213 (1885).

² 65 Mich. 23 (1887).

theory of the constitution, and of our state polity, before and since its adoption, looks to the imposition of local taxes for local purposes by local officers."

Here is the brief enunciation of a sound principle, the recognition of which by courts will go far to do away with the mischievous principle followed in the past by some courts, that towns and cities have no rights that the legislature is bound to respect.

An act of the legislature of Michigan attempted to extend the powers of the metropolitan police of Detroit over certain townships in Wayne County. In the case of *The Board of Metropolitan Police of Detroit v. The Board of Auditors of Wayne County*,¹ the Supreme Court of Michigan declared this act to be illegal. In the opinion by Campbell, J., the court says, after examining the act in question (p. 581):—

"The result is that the local board of Detroit draws from the funds of the county to carry on its own work in part of the townships entirely beyond its own jurisdiction, and at the expense as well of the cities and townships where none of this money is spent as of the townships patrolled. We think that no such extension of powers can be granted, and that the attempt to make the grant is illegal."

It would seem from the language used by the court (at p. 579) in speaking of *People v. Mahaney*,² that, were the question raised in that case new, a different result might be reached. At any rate, this decision places a limit upon the powers of such a board, and thereby restricts the operation of the decision in *People v. Mahaney*. The dissenting opinion of Sherwood, C. J., is noticeable because of his statement (p. 589) that the constitution is not a grant of powers but a limitation thereof. It is submitted, on the contrary, that every constitution is a grant of powers to stated agencies of government, together with a limitation thereof. See the authorities already quoted.

Upon this review of the Michigan cases on this subject, it is evident this state is definitely committed to the views herein presented as to the inherent right of local self-government of towns and cities.

We come now to those cases in the Supreme Court of the United States that are often cited as authorities to sustain the proposition that towns and cities are the creatures of the state and are therefore subject to its will without limit or control by the courts.

¹ 68 Mich. 576 (1888).

² 13 Mich. 481.

Barnes v. Dist. of Columbia:¹ This was a case upon error to the Supreme Court of the District of Columbia, upon an action to recover damages for a personal injury by the plaintiff in consequence of the defective condition of one of the streets of the city of Washington. A verdict for the plaintiff for \$3500 was set aside at the general term of the Supreme Court of the District and judgment was ordered for the defendant. A writ of error was brought, and the Supreme Court of the United States reversed the judgment, holding the District liable under the act of Congress of February 21, 1871 (16 Stat. 419), Field and Bradley, Swayne and Strong, JJ., dissenting.

We need not disagree with the decision that the plaintiff was legally entitled to the verdict the jury had found for him, but we must protest against the language used in the decision as *obiter dictum*, unless it is restricted to the case of the District of Columbia that was before the court.

"A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the state. The legislature may give it all the powers such a being is capable of receiving, making it a miniature state within its locality. Again: it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all of the powers usually committed to a municipality. We do not regard its acts as sometimes those of an agency of the state, and at others those of a municipality; but that, its character and nature remaining at all times the same, it is great or small according as the legislature shall extend or contract the sphere of its action."

It is obvious that this is mere *obiter dictum* unless the language used is limited to the case before the court. All towns and cities in the United States did not originate in the same way, nor have they all the same rights, powers, and duties. To arrive at any general rule concerning them, we must study their different origins and the history and development of each state. Then those states where towns and cities are of like origin and political development may be grouped, and thus we shall get at different classes or kinds of towns and cities, and we can compare these classes with each other, and thus we shall reach different rules for different states. This would involve the same study of the history and political development of each colony or state that has been in these papers

¹ 91 U. S. 540 (1875).

attempted in the case of Rhode Island, but unfortunately time and space are here lacking. It is, however, immediately apparent that the District of Columbia stands in a class all by itself. It was set apart at the time of the adoption of the Constitution of the United States as the seat of the national government, and, without following the successive steps in its government, it was organized as a municipal corporation under the act of Congress of February 21, 1871 (16 Stat. 419), and is the only city of its kind in the country, having had no constitutional development of its own. Probably at the other end of the scale stand the towns and cities of Rhode Island, with their independent origin and self-originated powers and union, with local rights to self-government still preserved, although not always recognized or known by its own citizens. To formulate a general rule as to the status of all municipalities in the United States upon the sole, solitary, and peculiar example of the District of Columbia, regardless of the history of the Anglo-Saxon race, the institution of town government in Germany and in Saxon England, its introduction on this continent by our Puritan forefathers, its development in the New England colonies, its non-development in Virginia and other southern colonies, the conflict between this system and that of the southern colonies still going on in the western territories and states, where the town system of New England is gaining in strength, etc., would be to impute such ignorance to the learned members of the United States Supreme Court as would be unwarrantable and unreasonable. We must therefore limit the application of the principle stated in this opinion to the case actually before the court. Thus limited it amounts to this: the District of Columbia is but a department of the United States, subject to the will of Congress, and is its seat of government, over which Congress is supreme under the Constitution of the United States; under the government thereof provided by the act of Congress of February 21, 1871, the municipality is liable for an injury received through the defective conditions of one of its streets. The case is not an authority for the proposition that all towns and cities are creatures of the legislature and are subject to its unlimited control. That question was not before the court.

It would seem, however, that the writer of this opinion was not familiar with town government in New England, for he says (page 552): "And here a distinction is to be noted between the liability of a municipal corporation, made such by acceptance of a village or city charter, and the involuntary *quasi*-corporations

known as counties, towns, school-districts, and especially the townships of New England."

Certainly the classification of New England towns as *quasi*-corporations cannot be defended. Dillon¹ defines municipal corporations as "institutions designed for the local government of towns and cities; or, more accurately, towns and cities, with their inhabitants, are, for purposes of subordinate local administration, invested with a corporate character." "The phrase, 'municipal corporations,' in the contemplation of this treatise, has reference to *incorporated villages, towns and cities*, with power of local administration, as distinguished from other public corporations, such as counties and *quasi*-corporations."²

In New England generally, and in Rhode Island in particular, cities are but towns that have increased in population until, owing to the difficulty of carrying on their government under the old form, they have petitioned the legislature for a change from the town form to the city form of government.³ Both are corporations. So in Massachusetts, cities are but towns with a modified system of government.⁴ Towns in the New England colonies have always enjoyed those rights that Stubbs⁵ states as the rights of cities in England: "Free election of magistrates, independent exercise of jurisdiction in their own courts and by their own customs, and the direct negotiation of their taxation with the officers of the exchequer."

It will be seen, therefore, that cities, in the New England states at least, did not originate in the manner stated by Goodnow:⁶ "The origin of municipal corporations is everywhere the same. It is to be found in the grant to certain sections of the country in which were to be found comparatively large aggregations of people, of a series of privileges."

It was thus that Roman absolutism originated cities. But in the case of Rhode Island, for instance, whose colonial constitutional development has been explained in these papers, it would be more correct to say that a city is a town with some of the rights of its freemen taken away at its own request, and vested in a council, elected by the freemen, because, with increase of population, the old town system of government was becoming unman-

¹ 1 Mun. Corps. sec. 12.

² 1 Dill., Mun. Corps. sec. 22.

³ 1 Dill., Mun. Corps. sec. 28.

⁴ Debates in Conv. 1820, ed. 1853, 125, 192, 193; Warren v. Mayor, etc. 2 Gray, 84, at 101 (1854); Hill v. Boston, 122 Mass. 344, at 345, 366 (1877).

⁵ 1 Const. Hist. of Eng. 628.

⁶ 1 Mun. Home Rule, 11.

ageable. Because the boroughs or cities of England are not towns with a changed form of government, we must not forget that is what towns are in New England. In Massachusetts, towns were incorporated in 1785.¹ Nevertheless, they were admittedly corporations even before then. "Towns were of themselves corporations, having perpetual succession, consisting of all persons inhabiting within certain territorial limits."² The learned judge was treating of a statute of 1772, and what towns were at that time. This is the construction put upon his language in *Hill v. Boston*³ by Gray, C. J. In New York, towns and counties were not incorporated until 1829.⁴ In Rhode Island, as we have seen, towns have always been corporations.

*Mount Pleasant v. Beckwith*⁵ is another decision of the Supreme Court of the United States that is often cited as authority for the proposition that a municipality is the creature of the state and is subject to its will.

In this case it was held that where no constitutional restriction is imposed, the corporate existence and powers of counties, cities, and towns are subject to the legislative control of the state creating them.

We need not disagree as to this conclusion if we agree upon what constitutes a constitutional restriction. If this eminent court meant that such a restriction must be found in the written constitution only, we cannot agree with them. If they meant, in accordance with the authorities herein cited, that a constitutional restriction may be found in the unwritten constitution as well as in the written constitution,—that the constitution is not wholly written, and therefore part of it is to be found outside the written constitution,—then the decision in this case may be accepted by all.

What was really decided in this case was that where a municipal corporation is legislated out of existence and its territory is annexed to other municipalities, the latter become entitled to all its property and immunities and are severally liable for a proportionate share of all its then existing debts, etc., unless the legislature otherwise provides.

It is true the opinion, at p. 524, uses this language: "Counties, cities, and towns are municipal corporations created by the author-

¹ 9 Gray, 511, note.

² By Shaw, C. J., in *Overseers of the Poor of Boston v. Sears*, 22 Pick. 122, at 130 (1839).

³ 122 Mass. 344, at 356 (1877).

⁴ 2 Wend. 109; 2 Johns. Ch. 320, 325.

⁵ 100 U. S. 514 (1879).

ity of the legislature, and they derive all their powers from the source of their creation, except where the constitution of the state otherwise provides."

Again, as in the last case, this enunciation of a general principle must be looked upon as *obiter dictum*, unless it be limited to the case actually before the court. That case came from the state of Wisconsin; and it may be a correct statement of the law in that state, but it certainly would not be a correct statement of the law in Rhode Island. We have not time nor space to enter now into an examination of the origin and development of town powers in Wisconsin, as we have in the case of Rhode Island, and therefore we cannot now answer the question thus raised.

Merewether v. Garrett:¹ The question in this case was, upon the dissolution of a municipal corporation by the legislature, what property of the defunct municipality is liable for its debts, and how shall it be got at?

Among the propositions of law enunciated by the court in this case are several that are *obiter dicta* if stated as universal propositions of law, but which may be sustained if confined to the particular case before the court.

Thus on p. 501 (2) it is stated that the private property of individuals within the limits of the city whose charter is annulled cannot be subjected to the payment of the debts of the city, except through taxation. It is admitted law to the contrary in the New England states generally.

Page 501 (3) it is stated: "The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature."

But we have seen, in our examination of the history of the towns of Rhode Island, they had that power before they united to form the colony, and they therefore did not derive that power from the legislature. Page 511 states: "The right of the state to repeal the charter of Memphis cannot be questioned. Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies and repeated by text-writers." With all due respect to this learned and august court, we submit that this is erroneous. Witness the many opinions to the contrary cited in these articles.

¹ 102 U. S. 472 (1880).

So far as the particular case before the court is concerned, it may be that a study of the constitutional history and development of the state of Tennessee would show that this state had a right to repeal the charter of the city of Memphis. No one can pronounce an opinion upon that question without such a study of the history of that state.

But we must emphatically dissent from the rest of the statement quoted, as the correct enunciation of a general principle of law; and we humbly submit that the cases cited, the arguments presented, and the points of constitutional history and development herein submitted, warrant our dissent from such a statement as altogether too general and too sweeping as a statement of a general principle of law. It must be restricted to the particular case before the court.

We must object to such a general statement as that made *obiter dictum* in *United States v. Railroad Company*¹ by Hunt, J., in delivering the opinion of the court:—

“A municipal corporation like the city of Baltimore is a representative not only of the state, but is a portion of its governmental powers. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state. The state may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the state at large. It may enlarge or contract its powers or destroy its existence.”

Certainly no such form of absolutism was ever established by our forefathers in any English colony in this country. As a description of a system of Turkish or Persian absolutism the statement may stand. As a description of a system of government, the outgrowth of the union of autonomous towns, as in Rhode Island and other New England colonies, it is misleading and inaccurate.

Again, in *Laramie County v. Albany County*,² in the opinion delivered by Clifford, J., may be found an array of generalities *obiter dicta* that would make it necessary to study the history and development of each colony and state mentioned, before acceptance as the correct statement of a general legal principle. Thus, at p. 308, “they (municipal corporations) are under the entire control of the legislature, from which all their powers are derived.” P. 312: “Such corporations are the mere creatures of the legislative will; and inasmuch as all their powers are derived from that source, it follows that those powers may be enlarged, modified, or diminished at any time, without their consent, or even

¹ 17 Wall. 322, at 329 (1872).

² 92 U. S. 307 (1875).

without notice. They are but subdivisions of the state, deriving even their existence from the legislature. Their officers are nothing more than local agents of the state, and their powers may be revoked or enlarged, and their acts may be set aside or confirmed at the pleasure of the paramount authority, so long as private rights are not thereby violated."

The case in which these broad principles are stated was brought by one county against another county, as the name shows. The question involved turns upon the rights of counties exclusively. To go beyond that, and to lay down a general principle applicable alike to counties, cities, towns, districts, etc., is, of course, *obiter dictum*, — a fault that seems to have infected all these decisions denying the existence of town powers.

We are not called upon to deny that the decision was right in itself in this and in many other cases we are criticising. Probably in the territory of Wyoming, where this case arose, it was correctly decided, because it is probable that there counties have no original powers of their own. They are probably only geographical subdivisions of the state created by the legislature for convenience of administration. But it is a far cry from such mushroom institutions as counties in a territory, with no historical development behind them, to the towns of New England with all that the mere suggestion of their name brings to mind, their Teutonic origin, their growth and development in England, their institution in this country by our forefathers of their own mere motion, without authority of any kind from over the seas, as in the case of the original towns in Rhode Island, their union into a self-instituted colony afterwards a state, etc., etc. To mix these all up, to ignore all distinction, to lay down, in a case not requiring it, a general principle of law as applicable alike to counties, towns, cities, school-districts, etc., is *obiter dictum* of the most objectionable kind. If we follow down the line of these cases, we will constantly find a later case citing as sound law that which was *obiter dictum* in some preceding case, until little by little the law has become in some jurisdictions what it is now generally supposed to be, with regard to the non-existence of town powers. Even the learned and extremely valuable opinion by Gray, C. J., in *Hill v. City of Boston*,¹ is marred by the unquestioned acceptance of the prevalent notion that towns are the creature of the legislature, and are subject to its will. Thus, at p. 380, he speaks of "the doctrine

¹ 122 Mass. 344 (1872).

that the purpose of the creation of municipal corporations by the state is to exercise a part of its powers of government — a doctrine universally recognized, and which has nowhere been more strongly asserted than by the Supreme Court of the United States in the opinions delivered by Mr. Justice Hunt in *United States v. Railroad Co.*, 17 Wall. 322, 329, and by Mr. Justice Clifford in *Laramie v. Albany*, 92 U. S. 307, 308."

The learned judge well knew that the right to send representatives to the general court of Massachusetts has been adjudged to be the right of every town in the commonwealth under its constitution, for he cites the case (p. 356) of *Warren v. Mayor, etc.*,¹ reported by himself, in which Shaw, C. J., makes this statement, citing the Const. of Mass. c. 1, § 3, art. 2: . . . "every corporate town containing one hundred and fifty ratable polls may elect one representative."

The last of these cases before the Supreme Court of the United States that we propose to examine is that of *Met. Railroad Company v. District of Columbia*.¹ The District sued the railroad company for work done and materials furnished by the plaintiff in paving certain streets in Washington in 1871, 1872, 1873, 1874, and 1875, in consequence of the neglect to furnish such material and do such work in accordance with its duty as prescribed by its charter. Twelve pleas were filed, the last two being pleas of the statute of limitations. These two were demurred to, issue being joined upon all the others. The court sustained the demurrer and the cause was tried on the other issues, and a verdict was found for the plaintiff. The case was brought to the Supreme Court by writ of error, bringing up for consideration a bill of exceptions taken at the trial and the ruling upon the demurrer. Upon consideration of the demurrer the judgment was reversed, the court holding that the court below erred in supposing the case is founded upon a statute. It is an action on the case upon an implied assumpsit arising out of the defendant's breach of a duty imposed by statute, and the required performance of that duty by the plaintiff. We need not differ from the court in its decision of the case, but we must again emphatically dissent from the *dictum* on p. 8 unless limited to the case before the court: "All municipal governments are but agencies of the superior power of the state or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior legislature sees fit to confer upon them."

¹ 132 U. S. 1 (1889).

It is a subject for deep regret that this exalted tribunal should thus allow itself to enunciate general propositions of law that are broader than the case before the court or not germane to it. Such *obiter dicta* but impair the reputation of the court and detract from our respect for its judgments.

The State *v.* Covington:¹ In this case the validity of an act of the legislature creating a Board of Police Commissioners and a Board of Health for the city of Cincinnati was affirmed. As usual in acts of this kind, this act appropriated the money and property of the city for the purposes of the act and without the consent of its voters, while the officers appointed were in no wise under the control of the city or of its council. It need only be said once for all that all these acts are of this nature. Indeed, these provisions are the main reason for their passage. If the commissioners appointed under these acts are made subject to the appointment or control of, and are paid by, the city they are appointed to rule over, the real reasons for their appointment are done away with, and the legislature would take no further interest in the passage of these acts.

The point was raised by the relator in this case at p. 107 that a police officer of this kind, whose powers are strictly limited in their exercise to the city, is not a state officer, but is purely a local officer, and that, if he is a state officer, he should be paid by the state; but on p. 114 the opinion denies that such policemen are local officers. At p. 112 the same objectionable statement is to be found that was so often used by the courts at this period: "Cities and villages are agencies of the state government," etc. The common and unquestioned acceptance of this doctrine only shows how low was the state of knowledge at this time of the members of the bench and bar in many states of the constitutional history and development of the various states. For many years the study and attention paid to our federal constitutional development seems to have prevented proper attention to town and state constitutional development.

The argument was presented in this case that prior to the adoption of the existing constitution of Ohio, in 1851, the police of the cities and villages of the state had been elected by the electors thereof, or appointed by authorities elected by them, and therefore as, according to their constitution, "all powers not herein delegated remain with the people," the power to change the ex-

¹ 29 Ohio State, 102 (1876).

isting system was intended to be withdrawn from the general assembly. The opinion says: "To this argument a majority of the court desires to express their unqualified dissent. By such interpretation of the constitution, the body of laws in force at the time of its adoption would have become as permanent and unchangeable as the constitution itself." And why not? Had not the framers so intended, they would have otherwise provided.

It would be necessary to make the same examination of the constitutional development of town and state powers in Ohio as has been made in these papers of the same question in the case of Rhode Island. The result may prove the decision in this case to be well founded, in consequence of that peculiar history and development. But even if such be the case, it would not warrant as a general principle of American law the statement made in the opinion, "Cities and villages are agencies of the state government," etc.

This decision was followed in *State v. Smith*.¹ The members of the local boards under an act in question were to be appointed by the governor, although their duty was clearly only local, "and each member of said board shall personally supervise the cleaning, repairing, and improvements of the streets, alleys, avenues, lanes, public wharves and landings, market houses and spaces, bridges, sewers, drains, ditches, and culverts in one of the districts into which such city may have been or may be divided. Each member was to receive a salary of four thousand dollars a year—rather a high price to pay for supervisors of scavengers, but high enough to make the act an object for the political machine in power, that it might have some good fat "plums" to reward its henchmen with, free from control by the local community—the common object of all these acts. Owen, C. J., in a vigorous dissenting opinion, characterizes the act as "a scheme of conspiracy and fraud, unparalleled in the history of legislation" (p. 382), and Follet, J., concurring in this dissenting opinion, sufficiently shows the rascality of the act. Even the opinion of the majority sufficiently admits the character of the act when it says (p. 374): "Over the wisdom or policy of this legislation this court has no control," citing the language used by Black, J., in *Sharpless v. Mayor*:² "There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary," and concluding, "The remedy in such cases is with the people."

¹ 44 Ohio St. 348 (1886).

² 21 Pa. St. 162.

It is remarkable that at this late date (1886) this able court should have found the well-established distinction between the public and the proprietary characters of a municipal corporation to be "illusory and without any well-founded distinction in principle" (p. 373). It is evident the court did not have before it the case of *Hill v. Boston*,¹ in which Gray, J., states, at p. 359, this distinction, and shows beyond peradventure that it cannot be doubted.

"The distinction between acts done by a city in discharge of a public duty, and acts done for what has been called, by way of distinction, its private advantage or emolument, has been clearly pointed out by two eminent judges, while sitting in the supreme courts of their respective states, who have since acquired a wider reputation in the Supreme Court of the Union, and by the present chief justice of England. Nelson, C. J., in *Bailey v. Mayor, etc. of New York*, 3 Hill, 531, 539; Strong, J., in *Western Saving Fund Society v. Philadelphia*, 31 Penn. St. 185, 189; Cockburn, C. J., in *Scott v. Mayor, etc. of Manchester*, 2 H. & N. 204, 210."

This case of *The State v. Smith*² sustained the validity of an act of the legislature authorizing the governor to appoint the members of a Board of Public Affairs in cities of the first grade of the first class. The opinion rests upon the provisions of the constitution of Ohio, the previous decisions in the state, and on page 372 the opinion expressly states that it is in the exercise of power expressly delegated by the constitution to the general assembly "that the entire system of municipal government for cities and villages has been created in this state. The entire details of the system that may be devised, and the public agencies that may be employed for administering it, and whether they shall be elected or appointed, is left by the constitution to the wisdom of the legislature."

Whether these findings could be sustained upon a critical examination of the constitutional development of town powers in Ohio would require an examination that cannot be gone into now. Accepting it as the established law in Ohio, let us remember, however, that that does not establish its truth as the statement of a universal principle of American law. Because in Ohio there is no right to local self-government, it does not follow there is no such right in any other state in the Union.

Commenting upon the case of *The People v. Hurlbut*,³ the opinion says (p. 373):—

"The law was held invalid, not because it violated any express provi-

¹ 122 Mass. 344 (1872).

² 44 Ohio State, 348 (1886).

³ 24 Mich. 44.

sion of the constitution, for it was admitted that it did not, but because it was thought to contravene certain principles of local self-government, that the court by way of inference regarded as part of their system of government."

The experience of many states since 1886, when this opinion was written, shows that unless our courts do what they can to sustain these principles of local self-government, these rights to local self-government will continue to be gradually lost by the increasing assumption of the power by the legislatures of the various states to wrest them from the towns and cities. This is done by the appointment of boards of all kinds, whose members are appointed by the governor or the legislature, at the dictation of the political machine that may happen to be in power, and are paid large salaries by the particular towns and cities over which they are appointed, but without being subject to their control. Such a system may do in France, but it is not in accord with American principles of government.

*Burch v. Hardwicke*¹ is a case affirming the invalidity of an act of the mayor in removing the chief of police (for cause) instead of suspending him, because he is a state officer and not a local officer, the mayor having power only to suspend him, and not to remove him, as he might were he a city officer. The opinion is clear and able, but contains the objectionable *obiter dicta* statements (p. 32):—

"It must be borne in mind that cities and towns are mere territorial divisions of the state, endowed with corporate powers to aid in the administration of public affairs. They are instrumentalities of the government acting under delegated powers, subject to the control of the legislature, except so far as may be otherwise expressly provided by the constitution."

Even if an examination of the history and development of Virginia should show this statement to be true as to Virginia, there was nothing in the case that called for so broad a statement. And certainly it is not true as a statement of American law generally.

In the case of *Coyle v. McIntire*² it was held that a municipal corporation is merely a revocable agency, instituted by the state for the purpose of carrying out in detail the objects of government, and therefore an act of the legislature establishing a Board of Water Commissioners for the city of Wilmington is constitutional and valid, and the commissioners appointed by the legis-

¹ 30 Gratt. 24 (1878).

² 7 Houston (Del.), 44 (1844).

lature under that act may remove the chief engineer appointed by the City Council, and may appoint another in his place.

The argument was briefly presented, pages 53, 54, 65, 67, that municipalities have a right to local self-government, but the history of the subject and the constitutional development of the state were not given in any detail. This argument was lightly dismissed in the opinion (p. 91):—

“The theory of the plaintiff in error, as presented and discussed by his counsel, is a beautiful one. It has all the charm which attaches to the principle of local self-government. Whether the universal recognition by legislative and judicial tribunals as applicable to municipal corporations would be attended by all the advantages, and result in all the beneficial consequences, supposed by its advocates, can only be determined when human experience in this respect, if ever, may safely be invoked as a final arbiter.”

This calmly ignores or brushes aside as of no value the whole history of local self-government in the New England and other states, and deprives the opinion of value. It denies also the well-recognized distinction between the public and the private character of municipal corporations (pp. 92–94). On page 96, however, the opinion recognizes the distinction to be well founded, in a supposed case there discussed.

The police power knows no bounds according to this opinion (p. 100): “The police power of a state is great, and may do whatever is necessary to promote the safety and health of a municipality.”

Of what avail are the restrictions of any constitution, if they can be swept away at will by the uncontrolled and uncontrollable exercise of the police power thus enlarged in operation? A new clause must be added to our Bills of Rights if this doctrine be law. It may accord with the principles of the Roman law, but it certainly is not in accord with the regard for the rights of the individual that we have imbibed as the foundation of the system of Anglo-Saxon law.

In *The State v. Hunter*¹ the validity of an act providing for a metropolitan police force, to be appointed by the executive council, was affirmed. At page 581 the opinion is made to rest upon the exercise by the legislature of the police power.

Again do we find the same old statement: “Cities are but

¹ 38 Ks. 573 (1888).

agencies of the state, created to aid in the conduct of public affairs."

It may be that in states of mushroom growth, like some of our western states, their political history and political development can show no such a system of town powers, and of evolution of state powers from town powers, as can be shown in Rhode Island and in other New England states. But the report of this case does not show that any such examination of the history and development of Kansas was presented to the court. Unless limited to the state of Kansas, the case actually before the court, it is submitted that the principle so broadly stated by the court is not one of universal application.

Even a text-book of such recognized excellence as Angell & Ames on Corps.¹ makes the unqualified statement: "The legislature has absolute control over municipal corporations, to create, modify, or to destroy them at pleasure," and cites a string of authorities in support of this doctrine, not one of which is a decision in any New England state. But uniformity in state constitutional law is not possible under a union of states with different constitutional developments such as our states have had, and it is time the text-book writers, the bar, and the courts should recognize this fact. Indeed, nothing but ignorance of this local constitutional development, unlike in different states, can account for the decisions made a hundred years ago, when the documentary evidence of early town powers was not yet in print. It is, however, most unfortunate that these decisions should have been followed afterwards when we became provided with the means of knowing they were erroneous. But *obiter dicta* upon *obiter dicta*, even to the *n*th power, cannot establish as a sound principle of law that which is essentially unsound.

Amasa M. Eaton.

¹ 10th ed. 22, note 3.

[To be continued.]

LAW AND LOGIC.

IT appears that the logicians themselves are not agreed in their definition of logic.¹ But most of us laymen, when we think of logic, think of the syllogism—a process of reasoning by which, from certain general propositions which are assumed, we reach an irresistible conclusion.

For example:—

All men are mortal.

All kings are men.

Therefore all kings are mortal.

When Chief Justice Holmes condemns as fallacious “the notion that the only force at work in the development of the law is logic,”² he calls sharp attention to the fact that judicial conclusions do not flow irresistibly from certain established general propositions, that the problems with which lawyers and judges have to deal are not susceptible of a mathematical solution. To hold that logic can answer the questions which judges are compelled to answer is giving to this tool of the reasoning faculty a power which its makers never claimed for it, and here lies, as it seems to me, the chief trouble with Professor Thayer’s distinction between law and logic as indicated in the following sentence: “Admissibility is determined, first, by relevancy, — an affair of logic and experience, and not at all of law; second, but only indirectly, by the law of evidence, which declares whether any given matter which is logically probative is excluded.”³

We get a little closer to his meaning if we examine a case which he cites as one of a great number of cases which “involve no point at all in the law of evidence.”⁴ Richardson sued the railway for damages caused by its negligence in failing to prevent the spread of fire from its property to the plaintiff’s adjoining property, and he contended especially that the railway ought to have kept a watchman at a certain place on its line. The defendant offered to show that it was not the practice of other

¹ Mill’s System of Logic, 1.

² “The Path of the Law,” 10 HARVARD LAW REVIEW, 465.

³ Preliminary Treatise on Evidence, 269.

⁴ Grand Trunk Railway v. Richardson, 91 U. S. 469.

railways to employ watchmen in like cases. The court, after defining negligence as the failure to exercise the caution and diligence which prudent men ordinarily exercise, held that the evidence offered was irrelevant.

On what ground is this case banished from the domain of law? Because the court has excluded evidence which the author considers logically irrelevant. If the author had considered the evidence to be relevant, then, if I understand him aright, the decision would have become a part of the law of evidence, for "the law determines as among probative matters, matters in their nature evidential, — what classes of things shall not be received" (p. 264). It appears, then, that when the court decides that a matter which is logically relevant is admissible, or that a matter which is logically irrelevant is inadmissible, it is deciding no point of law, and that the law of evidence begins only when the courts either unconsciously or purposely violate the rules of logic concerning the relevancy of evidence.

Any successful effort to drive out of the field of evidence a large number of the cases which we find there would be greeted by most of us with enthusiasm. It might enable us to grapple with the cases which were left with greater courage. But this effort, as it seems to me, is bound to fail, simply because logic furnishes no test of relevancy; and unless we permit the law to decide that question for us, it is not going to be decided at all.

Let us see, for example, how far logic would help us to answer a question suggested by John Stuart Mill in his chapter on "Approximate Generalizations:" "A hearsay of a hearsay is worthless at a very few removes from the first stage."¹ It is to be noticed that this great logician does not venture to say at just what stage hearsay becomes worthless; and if we put to ourselves that question, if we consider for a moment how many impossible assumptions we must make in order to supply a basis for mathematical calculation, we shall see how far removed we are from the field of exact knowledge. Let us suppose that the statement of a witness has a probative value when it is a little more likely to be true than false. If we assume, then, that all men are equally truthful and have equally good memories, and if we assume further that they are equally truthful under all circumstances, whether they are under a special temptation to lie or not, and if we assume further that every man will tell the truth in seven cases out of ten, it follows

¹ Mill's *System of Logic*, ch. 23, sec. 6.

mathematically that the statement of a witness on the stand of what some other person said to him ought not to be received as evidence of the fact stated. $\frac{7}{10}$ of $\frac{7}{10} = \frac{49}{100}$. There is little less than an even chance that in such case we are getting the truth. Another illustration of our distance from the field of logical certainty is suggested by the author's criticism of a recent decision of the Supreme Court of the United States.¹

He refers to this decision as "a neat illustration of a common error," and after summarizing the statute of Virginia under consideration in that case he proceeds: "That is a statutory regulation of the responsibility of carriers; and yet, strangely, it is declared to be too plain for anything but statement that it is a rule of evidence. Perhaps this exposition may be accounted for by the fact that the learned and able judge who gives it was trained in the practice of Louisiana, where common law rules and principles are much modified or displaced."

Here we find that in the opinion of the Supreme Court the proposition that a certain statute is a rule of evidence is too clear for argument. In the opinion of the learned author, the proposition that the statute is not a rule of evidence is too clear for argument. All these ten gentlemen are trained thinkers. They have all studied logic. They have all studied mathematics. They will all agree that the angles of a triangle are equal to two right angles, and they will all agree that the whole is greater than any of its parts. The fact that they do not agree upon the question whether a given statute is a rule of evidence points irresistibly to the conclusion that law is not an exact science.

The last sentence in the criticism above quoted brings us back to the question of logical relevancy. When the author finds that the Supreme Court has erred, he looks for the cause of this error, and he suggests as a cause the fact that Judge White, who wrote the opinion in which all the judges concurred, comes from Louisiana. Other lawyers, I fancy, would say that this fact was irrelevant. But how shall the question of its relevancy be determined? Certainly there is no rule of logic that will help us, and I am utterly at a loss to see how the question is to be authoritatively determined except by the judgment of a court. Indeed, it is because men of intelligence and experience differ upon the question whether a given matter is relevant that they have to apply to the court to settle the dispute. And the judgment of the court,

¹ *Richmond Railroad Co. v. Tobacco Co.*, 169 U. S. 311.

when rendered, has the same value in this branch of the law that it has in any other branch. It settles the particular dispute not for that time only but for the future, and it settles a dispute which cannot be settled in any other way.

If you ask a lawyer whether he really believes that judicial decisions are mathematical conclusions, he will say that the notion is absurd; that when four judges vote one way and three another, it does not mean that the three or the four have made a mistake in addition or subtraction. It means simply that the different judges have given different weights to divers competing considerations which cannot be balanced on any measured scale. One judge, for example, may have greater faith in the honesty of witnesses than another judge, and be disposed to let in hearsay which another judge would exclude. The census of liars has not yet been taken, and it is just as inevitable that two different judges, when left free to act, should come to different conclusions concerning the value of hearsay, as that one man should be an Episcopalian and another a Baptist.

But while we are all ready to admit, when brought to book, that the law is not an exact science, we are constantly assuming the contrary. A lawyer, for example, who is deeply grieved by an adverse decision, will say, "I thought that I knew the law," implying that the present state of the law is the only question involved in the new judgment. This misconception as to the scope of the judicial process seems to be based upon a similar misconception as to the origin and scope of the law, a misconception sufficiently indicated in the familiar maxim, "It is the duty of the courts to apply the law and not to make it." This proposition assumes that the law is to be applied to the case in hand much as a yardstick is applied to a piece of cloth. Two careful men using the same yardstick are bound to reach the same result.

This REVIEW has already permitted me to state my reasons for believing that what we call the common law springs from our decided cases.¹ You may say, if you please, with James C. Carter, that our law "consists of rules springing from the social standard of justice," and you may say with equal truth that our statutes spring from the average wisdom of the community. All this is very proper talk for the evolutionist and the philosopher, but unless you are going to lose yourself in the fog of predestination,

¹ Vol. 12, p. 545.

you must assume that men are free agents, except as they are visibly controlled by other men. Environment may be getting in its perfect work on our legislators, but no man knows, until the session ends, what sort of a blue book Environment will bring forth. We assume, therefore, that our legislators behave pretty much as they please, and are responsible for their acts.

Now in precisely the same sense in which our statute law is made by the legislator, that which we call the common law is made by the judge. And in making that law he does not usurp any power which does not belong to him, for, as Bentham aptly says, a judgment which is used as a precedent "has the effect of a real law." To say, therefore, that the judge makes the law, is simply to say that he renders a judgment which becomes a precedent.

But the principle which gives to judgments the effect of law requires merely that an adjudged case which cannot be distinguished on any rational ground shall be followed. Beyond this the judge has a free hand to decide the case before him according to his view of the general good. It may be that his decision will be governed by "the social standard of justice," but the essential point is that no human being can tell how the social standard of justice will work on that judge's mind before the judgment is rendered. It is this element of uncertainty which gives to every new judgment the force of a new rule. Without this the law would be as fixed as the law of gravitation. It is this element of uncertainty, too, which makes the practice of the law a highly intellectual pursuit. An eclipse of the sun can be predicted with such ease and certainty that the astronomer turns the calculations over to his office boy. That is not the sort of work in which judges and lawyers are engaged.

Jabez Fox.

JOHN C. CALHOUN AND THE LABOR QUESTION.

THE system of slavery as it existed in this country before the Civil War and the present labor movement present one common feature, — a strong opposition to what may be called “free labor;” that is, labor directly competing with, but outside the control of, the system. In most cases this opposition has been of a local character, involving state or municipal laws alone, but sometimes, when the effort has been made to exclude from a State free laborers from other States, Federal questions have arisen, rights derived from the national Constitution have been measured against state authority, the relation of the States to each other and to the national government have been considered, and great political questions like Nullification, State’s Rights, and Secession have been argued and decided on legal grounds long before their appearance in politics.

Had slavery been, as the South claimed, a purely domestic institution in the States where it existed, it could not have entered national politics. The system depended, however, upon exclusion of free competition; that is, as has been said, the necessity which required that it should dominate wherever it existed made it particularistic and exclusive. This is the origin of Calhoun’s theories of the Constitution, and of those influences which forced the system of arbitrary control from the position of a domestic institution into the broad field of national politics. By the Constitution, Congress is given a national power of commercial regulation. Let such a power once be established and no State could exclude its operation. By the Constitution, citizens of each State have the rights and privileges of citizens of the several States, and wherever this was recognized any person could move from one State to another and freely compete there for labor. But the exercise of this right in Southern States plainly would be nothing less than the substitution of competition for a system of arbitrary control.

The question, therefore, which before the Civil War occupied so great a place in national politics, was a labor question in which those who supported the dominant system were in recognized opposition to the Constitution.

It is the same situation which has again arisen. We have once more the dominance of a labor system, the effort to exclude free competition, the resulting expansion from the position of a domestic institution into national politics, and then the necessary conflict with a free Constitution. There is even a flavor of State's Rights and Secession in Governor Tanner's threat, something more than a year ago, that "I will not tolerate this wholesale importation of foreigners into Illinois, and if I hear that a mob is to be brought into this State," . . . "I care not on what railroad it comes, or for whom, I will meet it at the state line and shoot it to pieces with Gatling guns."¹ Still more recently Arkansas has endeavored to prevent the entrance of free laborers from other States,² and other similar instances are not uncommon.³ Both in Illinois and Arkansas the attempt led to great violence, and placed considerable territories in a condition comparable only to that of civil war.⁴

It may be worth while, therefore, in view of the strength of the recent movement, to review the history of a similar movement attempted in the interest of slavery, to show how close a connection existed between its theories and direct assault upon national existence, and to outline the progress of this assault from resistance to the courts, until, joining with other causes operating in the same general interest, the result was open rebellion and resistance to the Federal army.

By the laws of many States before the Civil War, immigration of free persons of color was forbidden.⁵ In pursuance of this policy, South Carolina in 1822 passed a law of which the third section enacted, "that if any vessel shall come into any port or harbor of this State from any other State or foreign port, having on board any free negroes, or persons of color as cooks, stewards, or mariners, or in any other employment on board of said vessel, such free negroes or persons of color shall be liable to be seized and confined in gaol, until such vessel shall clear out and depart from this State; and that, when such vessel is ready to sail, the captain of said vessel shall be bound to carry away the said free negro, or free person of color."

In many ways, the statute bears a striking resemblance to the

¹ Speech at Madison, Ill., Oct. 27, 1898.

² *State of Arkansas v. Kansas & Texas Coal Co.*, 96 Fed. 353.

³ *The Commerce Clause of the Federal Constitution*, by E. P. Prentice and J. G. Egan, 192.

⁴ *United States v. Sweeney*, 95 Fed. Rep. 434.

⁵ *The Commerce Clause of the Federal Constitution*, 212 *et seq.*

law of Louisiana which the United States Circuit Court declared unconstitutional in 1895,¹ and which provided "that no sailor, or portion of the crew of any foreign sea-going vessel, shall engage in working on the wharves or levees of the city of New Orleans beyond the end of the vessel's tackle."

In 1823 the validity of the South Carolina law was attacked before Mr. Justice Johnson of the United States Supreme Court sitting on circuit in Charleston.² By the provisions of the Federal Constitution, citizens of each State are entitled to the privileges and immunities of citizens of the several States, and among the rights thus secured is "the right of a citizen of a State to pass through or reside in any other State for the purpose of trade, agriculture, professional pursuits, or otherwise."³ This was the very right which the legislature of South Carolina denied. What, then, was to be the effect of these discordant laws?

On behalf of free labor it was claimed that, within the scope of its operation, the Federal Constitution is supreme. For the slave-owners it was urged that, if a law passed by the State in the exercise of its acknowledged sovereignty comes into conflict with the Federal Constitution, they affect the subject and each other like equal opposing powers.

I have not seen the fact noticed elsewhere, but it is of historical importance that thus in 1823, nine years before the famous ordinance of South Carolina, the doctrine, afterward known as Nullification, was argued before a Federal court, and submitted to it for decision.

The position in which Mr. Justice Johnson was placed must have been exceedingly difficult. There was probably more or less disorder at the time, for the question was one which commonly awoke excitement; he was alone on the bench, and the whole weight of public sentiment in the community where he sat supported the organized system of the South. Like other judges of the Federal Circuit and District courts, and like most of the Federal justices, Mr. Justice Johnson had been a resident of the circuit to which he was assigned. He knew the tendencies of public opinion in the circuit, and was so situated as to feel their force. There must have been a strong temptation to yield to all these influences. Congress itself, when petitioned by Northern sailors for relief

¹ *Cuban S. S. Co. v. Fitzpatrick*, 66 Fed. Rep. 63.

² *Elkison v. Delieesseline*, 2 Wheel. Cr. Cas. 56.

³ *Corfield v. Coryell*, 4 Wash. C. C. Rep. 371; *Von Holst*, Const. Hist. U. S., 1846-1850, p. 140, note 1.

against this law, felt the pressure, for it took no action, and, as Prof. Von Holst remarks, "either considered the matter too unimportant to bother itself about, or else considered it prudent to let such a ticklish question alone."¹ Not so with Mr. Justice Johnson. The questions presented were simple. The first concerned the right of a free citizen of Massachusetts to enter and labor in the State of South Carolina. Does such a right exist? "The right to one's self," said Thiers, "to one's own faculties, physical and intellectual, one's own brain, eyes, hands, feet, in a word to his soul and body, is an incontestable right, one of whose enjoyment and exercise by its owner no one can complain, and which no one can take away. More than this, the obligation to labor is a duty, a thing ordained of God, and if submitted to faithfully secures a blessing to the human family."² This "incontestable right" is one of the privileges and immunities secured by the Federal Constitution.³ The second question concerned the supremacy of the United States government. Does the Constitution create a nation, or does it leave a number of sovereign States each free to nullify at pleasure the action of the Federal authorities? If freed from political influences, no simpler questions could have been presented, and in the Federal court no room was found for politics. It was under these circumstances that there was rendered the first of that long series of decisions by which the Federal courts have consistently maintained the right of every citizen to follow any lawful occupation at any place in the country. More than this, Nullification was for the first time judicially declared unconstitutional. The United States Constitution, "the most wonderful instrument ever drawn by the hand of man," said Mr. Justice Johnson in language suggestive of the famous phrase afterward used by Mr. Gladstone, created a paramount government which a State cannot throw off at its own will and pleasure.⁴

The following year the same question, arising upon somewhat different facts, but involving the same principle, came before the Supreme Court of the United States in the great case of *Gibbons v. Ogden*.⁵ In the opinion of the court rendered in that case, the supremacy of the Federal authority and the exclusive character of

¹ Const. Hist. of U. S., 1846-1850, p. 129.

² Thiers, *De la Propriété*, 36, 47.

³ *Corfield v. Coryell*, 4 Wash. C. C. Rep. 371; *Ward v. Maryland*, 12 Wall. 418, 430; *Joseph v. Randolph*, 71 Ala. 499; *United States v. Sweeney*, 95 Fed. Rep. 434, 450.

⁴ *Elkison v. Deliesseline*, 2 Wheel. Cr. Cas. 56.

⁵ 9 Wheat. 1.

the national control of commerce were clearly defined, and the rule then laid down is the established rule of the Federal courts to-day. In reading that momentous decision, apprehending, as we do now, the interests which were at stake, and with which the conclusion was pregnant, one cannot help pausing to wonder what might have been the result had that decision in any way been different from what it was. Had the utterance of the court upon the powers of the States been ambiguous; had expression upon the relation of the States to the Federal government been avoided and the element of nationality involved less explicitly been disclosed and asserted; had the advocates of the doctrine of Nullification, when the question entered the political field eight years later, the authority behind them of the Supreme Court, — where would the influence of that decision have led us now? The question at issue, we may be sure, had not then its present significance. Those who upheld the vast combination controlling Southern labor and excluding free competition had not yet been carried by their interests to seek the dissolution of the national government.

Notwithstanding these judicial decisions, South Carolina continued to enforce the unconstitutional statute, and her example was followed in Louisiana by the passage of a similar act, while at the same time the illegality of the proceedings was tacitly recognized, when, upon the protest of the English government, an exception in the operation of the statute was made in favor of foreign vessels. The freedom thus given to foreigners, however, the Federal government was unable to procure for its own citizens, and the matter, although often agitated,¹ rested until 1844, when the State of Massachusetts sent Samuel Hoar to Charleston and Henry Hubbard to New Orleans, there as its agents to take such legal steps as might be necessary to procure the discharge of citizens of Massachusetts imprisoned under these laws.

The arrival of these representatives in the cities to which they were sent created great excitement. It immediately became apparent that the labor question was not to be treated as other questions, that the law was not to be applied to it as to other subjects, but that its issues were to be determined in the street and by force. In both cases the mission was fruitless and the effort to appeal to the courts was abandoned. The laws directed against free labor solely because it was free remained upon the statute

¹ Report No. 80, House of Representatives, 27th Congress, 3d Session; *Validity of South Carolina Police Bill*, 1 Op. Atty.-Gen. 659, 2 Ib. 426, and cases cited in "Commerce Clause," p. 37, note 1.

books of Southern States "until swept away by the fire and blood which destroyed the guilty cause itself."

"What, and how potent," said Vice-President Wilson, "was the agency which this persistent injustice, these continued oppressions, exerted on that struggle, Omniscience only knows. How important a factor it became in that combination of causes which hastened on the bloody struggle, no human sagacity can divine. Nor can it be known how much the manly stand of Massachusetts, though then overborne, contributed to the building up of that power which, sixteen years later, grappled with slavery in arms and closed its career of crime."¹

In 1856, during the Kansas-Nebraska troubles, another aspect of the question arose which in some ways resembles conditions of recent occurrence. Kansas was claimed by the South, and this claim could be made good if free immigration could be excluded. The attempt was made, therefore, to prevent this immigration by force, and it was not long before many avenues of approach were occupied by border ruffians whose business it was to prevent free immigration. It was in this state of affairs that President Pierce called a special session of Congress that an appropriation might be made for the army. The bill introduced for the purpose contained a proviso looking to the use by the President of Federal troops to protect persons and property in the Territory of Kansas and upon the national highways leading thereto, as Federal troops have since then been used to protect national highways, mails, and interstate carriers.

In the Senate, debate upon the proviso was long and bitter. The Southern States, and all who with them supported the Southern system, had passed beyond their attitude of opposition to the Constitution and of disregard for judicial decisions to an attitude of open resistance to the Federal government. It is true that the use of the army as guardians of the peace upon the national highways could be hostile only to those who contemplated a breach of the peace, but opponents of the army did not shrink from the implied confession. Their cause depended so largely upon violence, and by it had won so many victories, that they could not regard the adoption of any effectual method for preserving public peace as an impartial performance of a primary governmental function, but rather considered it direct assistance of their enemies. The ques-

¹ Rise and Fall of the Slave Power in America, vol. 1, p. 585.

tion was fast becoming one of force merely, and the first battle against the Union armies was openly fought in Congress.

The national government, it was argued, had no right to protect interstate highways or interstate carriers. National highways leading to Kansas, it was said, extended through every State in the Union. "There are in Massachusetts," said Senator Cass, "national highways leading to Kansas." A proposition that the Federal power extended over such roads had never before been heard. "What right has the President to go into Missouri, Iowa, Illinois, or Indiana, and say, 'This is a national highway leading to Kansas; here I put my soldiers'? The State of Missouri protects individuals on the highways of Missouri, and you have no more right to go there and interfere with her than the English Parliament has."

The same position was taken by Senator Toucey of Connecticut, who was shortly afterward made Secretary of War. "If," he asked, "the President can protect persons and property in one portion of the country, can he not in another?" And then, as the consciousness asserted itself that his real purpose was not to debate constitutional questions, but was rather, at all events, to defend the interests of a labor system, he put the further question, "Can the President march an army into one of the Southern States, and, being of the opinion with some that slavery does not and cannot exist, interfere there and protect persons and property according to those motives?"

It would be hard to find an incident illustrating more clearly the incompatibility of slavery and free institutions. No single government could protect both. While it was necessary to protect slavery, commercial development of the country must wait; free intercourse between the States was impossible.

It was under the influence of these interests that Calhoun developed his doctrine that the United States Constitution created no nation; that the government which it established was Federal rather than national, "because it is the government of a community of States and not the government of a single State or nation." Its influence may be seen throughout the course of constitutional history before the Civil War, and although it had the distinct disapproval of the Supreme Court it was a doctrine which, by reason of its association with industrial interests controlling politics, no decision could overthrow.

Among the many constitutional changes which the Civil War produced, no other is so great as that effected by the disappear-

ance of this theory. In *Crandall v. Nevada*,¹ a case involving the right of free passage from State to State, may be found the substance of what was accomplished by that great struggle. All the triumph of the armies of the Union breathes in its stately judgment that "the people of these United States constitute one nation." The power which South Carolina asserted before the war was that of excluding citizens of other States. In 1865, Nevada laid a tax upon persons leaving or passing through the State. The difference is of detail. Both statutes asserted state jurisdiction over interstate travel. Such jurisdiction, the court said, is inadmissible, not alone because forbidden by one or two clauses of the Constitution, but because at variance with the spirit of the whole instrument.

Equal rights for all persons within its protection, — this is the accomplishment of the Federal Constitution.

"The most false and dangerous of all political errors," — this is the judgment of John C. Calhoun on the doctrine of equality.² In the system which he represented, equality had no place, and the free laborer was the first to suffer from its absence, for his only possession — the right to work — was taken from him.

In this respect the situation which has grown up since the Civil War exhibits similar conditions. Laborers within the system work upon the terms it establishes; those without have no recognized right to work at all, and to them it helps nothing that control is no longer in the hands of the masters. Government of all who want work by some who want work is idleness for those not governing. Protection is not given when intrusted to those whose interest it is to withhold it.

Under Roman law, guardianship of a minor was given to the next heir, in the belief that he best would care for the estate, but, said Sir William Blackstone, "they seem to have forgotten how much it is to the guardian's interest to remove the incumbrance of his pupil's life from that estate for which he is supposed to have so great a regard. And this affords Fortescue and Sir Edward Coke an ample opportunity for triumph; they affirming that to commit the custody of an infant to him that is next in succession is '*quasi agnum committere lupo, ad devorandum.*'"

E. Parmalee Prentice.

¹ 6 Wall. 35.

² Speech on the Oregon Bill, delivered in Senate, June 27, 1884.

THE SIGNIFICANCE OF THE HAY-PAUNCEFOTE CONVENTION.

THE true aspect of the Hay-Pauncefote convention is only apparent as one studies the history of the isthmian discussions and negotiations in the United States. The policy of our government since the administration of John Quincy Adams, the precise terms of the Clayton-Bulwer treaty, as well as certain principles of the Law of Nations, must be examined with care. Comment lacking such a foundation is necessarily unintelligent and misleading. Much of such comment has recently found its way into print.

Henry Clay, referring to an interoceanic canal in his instructions to the Commissioners of the Panama Congress of 1826, said:—

“If the work should ever be executed so as to admit of the passage of sea-vessels from ocean to ocean, the benefits of it ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon the payment of a just compensation or reasonable tolls.”

The Senate in 1835 requested President Jackson to negotiate treaties with the Central American governments in order to protect such persons as should undertake to construct an isthmian waterway, and to arrange for “the free and equal navigation of the canal by all nations.” Congress adopted similar resolutions in 1836. On the 12th of December, 1846, a treaty was concluded between the United States and New Grenada, by the terms of which the former country guaranteed “positively and efficaciously the perfect neutrality of the before-mentioned isthmus.” In 1849 Mr. Hise, *chargé d'affaires* of the United States in Central America, without the authority of his government concluded a treaty with Nicaragua. In the articles agreed upon there was secured for the United States exclusive jurisdiction over any isthmian route through that country. This treaty was unsatisfactory to the President, and so was never submitted to the Senate for ratification.

In the mean time England had acquired a lodgment in Central

America. She exercised dominion over the Mosquito Indians, occupying the country at the mouth of the San Juan River, the eastern terminus of the projected canal. At the north there was the settlement of British Honduras, and the Bay Islands in the Bay of Honduras were also claimed. The United States looked upon these encroachments with alarm and distrust. In 1849 Mr. W. C. Rives was sent to Paris, where he had an interview with Lord Palmerston with reference to the British claims. In his instructions, Mr. Clayton, then Secretary of State, said:—

“That the United States sought no exclusive privilege or preferential right of any kind in regard to the proposed communication . . . that the United States would not, if they could, obtain any exclusive right or privilege in a great highway which naturally belonged to all mankind, for they well knew that the possession of any such privilege would expose them to inevitable jealousies, and probable controversies, which would make it infinitely more costly than advantageous; that while they aimed at no exclusive privilege for themselves they could never consent to see so important a communication fall under the exclusive control of any other great commercial power.”

These utterances indicate clearly the policy of the United States prior to 1850. Our government was glad to join hands with Great Britain. We sought no exclusive control; yet exclusive European domination was not to be tolerated. Neutralization remained our fixed policy. Great Britain agreed. The result was the Clayton-Bulwer treaty.

The great purpose of that treaty was to establish the neutralization of the projected waterway. To accomplish such an end it was necessary to make some important preliminary stipulations. The text of the treaty is the best statement of what was agreed upon. In Article 1:—

“The governments of the United States and Great Britain hereby declare that neither the one nor the other will ever obtain or maintain for itself any exclusive control over the said ship canal; agreeing that neither will ever erect or maintain any fortifications commanding the same, or in the vicinity thereof, or occupy, or fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America.”

All of these stipulations were necessary. Neutralization of the canal prohibited exclusive control by either nation; it required the abandonment by England of her dominion over the Mosquito Indians, as well as her claims over the Bay Islands. It prohibited

the United States equally from colonizing in Central America. Fortifications along the canal it absolutely forbade. The fundamental idea expressed by the term "neutralization" prohibited cannon and ordnance. "Neutralized states, persons, and things," writes Professor T. J. Lawrence, "occupy exactly the same position towards hostilities actually in progress as neutral states, persons, and things; but they differ from the latter in that they are bound by international agreement to take no part in warlike acts, and are protected from warlike operations as long as they respect this obligation."¹ A "neutralized" canal is one which by the consent of nations is set apart from the seat of hostilities, naval and military. No fortifications frown upon its banks; no warships block its termini. It is impossible for two nations to insure the neutralization of an interoceanic canal by any agreement to which they are the sole parties. In view of this fact it was provided in the convention of 1850 that both the United States and Great Britain should endeavor to secure by treaty the acquiescence of other friendly powers, as well as that of the Central American governments. In this way the Clayton-Bulwer treaty was a *bona fide* though preliminary attempt on the part of the two states peculiarly interested to bring about the result desired. The intention of the negotiators was aptly expressed. In Article 8 it is stated that the contracting parties not only desired "to accomplish a particular object, but also to establish a general principle," and further, "that the canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford."

Since its ratification the binding character of the Clayton-Bulwer treaty has been often questioned. Lack of space forbids a full discussion of the several controversies which have arisen. Temporary failure on the part of England to relinquish her territorial claims aroused the indignation of our government. The settlement of British Honduras was not intended by the negotiators to be within the scope of the treaty, and therefore the retention of that territory was not unreasonable. England's continued claims over the Bay Islands, as well as her dominion over the Mosquito Indians, were, however, without justification. Her later abandonment of these claims, and her compliance with the terms

¹ The Principles of International Law, by T. J. Lawrence, Boston, 1898, p. 486.

of the treaty, entirely satisfied our government, as was indicated by President Buchanan in his message of December, 1860. The Clayton-Bulwer treaty was recognized as binding upon the United States by Mr. Seward in 1866, by Mr. Fish in 1872, and by Mr. Evarts in 1880. So long as the policy of neutralization seemed advantageous, the validity of the treaty was hardly questioned.

It was the aggressiveness of the French Panama enterprise which called forth from Congress and from President Hayes declarations of a new and different policy, involving a different interpretation of the compact of 1850. In his message of March 8, 1880, the President said:—

“The policy of this country is a canal under American control. . . . It will be the great ocean thoroughfare between our Atlantic and our Pacific shores, and virtually a part of the coast line of the United States.”

President Garfield reiterated the same policy. These utterances gave rise to a prolonged controversy concerning the Clayton-Bulwer treaty, conducted on the American side by Mr. Blaine and Mr. Frelinghuysen, and rebutted by Lord Granville in behalf of Great Britain. Neutralization—the traditional policy of our government—was flung aside. In its place there was offered a unique substitute. In support of it the proposition was advanced that the Clayton-Bulwer treaty was a lapsed and voidable agreement; and, further, that circumstances had so changed since 1850 that the United States was no longer bound to observe the terms of its contract. Our secretaries found that they had to defend the difficult side of the case. The doctrine of American control had been launched with more zeal than discretion. However patriotic may have been the motives of its advocates, the policy itself had but little foundation in law or history.

The advantages of a neutralized canal, and also the binding character of the Clayton-Bulwer treaty, have since been reasserted. President Cleveland, in his annual message of December, 1885, vigorously emphasized the former. The latter was admitted by our own government as well as England in 1894, in communications relating to the Greytown disturbances, in which a British consul and British marines had played a prominent part. On February 5, 1900, Mr. Hay and Lord Pauncefote signed a convention which recognized the binding character of the articles agreed upon in 1850. Finally, in a report of the sub-committee of the Senate Committee on Foreign Relations, submitted March 9, 1900, the following reference was made to the Clayton-Bulwer treaty:—

"Since 1860 the Clayton-Bulwer treaty has been in some way recognized by the government in each of the succeeding administrations as a subsisting compact. Strong reasons for its abrogation have been frequently stated, and some have always denied its obligatory force, but no movement to accomplish that result has been made, either by Congress or the Executive."

Intelligent discussion of the merits of the Hay-Pauncefote convention is an impossibility without the decision of this preliminary question: whether or not the Clayton-Bulwer treaty is at the present time binding upon the parties thereto. If we yield to the consensus of opinion of almost all persons now familiar with the diplomatic history of the United States for the past seventy-five years, we must without hesitation answer the question affirmatively. The significance of the new treaty then becomes at once apparent. Whether the United States is gaining or losing by the new agreement is simply a matter to be ascertained by comparison of the two treaties. In Article 1 of the Hay-Pauncefote convention, the United States is given the right to construct an isthmian canal at any time under its own auspices, and to "enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal." The treaty of 1850 gave no such privileges. In Article 2 of the new agreement it is provided that the United States shall maintain a military police along the canal sufficient to insure its protection. The treaty of 1850 contains no similar stipulation. An adequate force might require the services of many men; and under the Clayton-Bulwer treaty, England might well claim the right to send British soldiers to the isthmus for the purpose of protecting the canal in common with the United States. The new treaty, removing the possibility of such a contingency, and with a delicate regard for American sentiment, intrusts the entire protection of the isthmian waterway to American hands. Thus it is clear that the Hay-Pauncefote convention contains concessions which are not found in the Clayton-Bulwer treaty. That these concessions are of value is not to be questioned.

In many respects the two treaties of 1850 and 1900 are alike. The principle of isthmian neutralization established in 1850 is reasserted in the compact of 1900. An arrangement for the application of that principle is set forth according to the plan adopted by the Constantinople convention of 1888 for the neutralization of the Suez Canal. In the second section of the first article of the Hay-Pauncefote convention it is stipulated that "the canal

shall never be blockaded, nor shall any right of war be exercised or any act of hostility be committed within it." The Senate committee's amendment, however, renders such a prohibition nugatory. It is there provided that the conditions and stipulations in sections 1, 2, 3, 4, and 5 shall not "apply to the measures which the United States may find it necessary to take for securing by its own forces the defence of the United States and the maintenance of public order." However vague the language used, the purpose of the amendment is clear. The attempt is made to give the United States, when at war, the right to hold the canal as a part of its coast line, to defend and blockade it as such, and, if necessary, make it the centre of hostilities. It is evident that the status of such a waterway would be wholly unlike that of a neutralized canal, and widely different from that agreed upon by Mr. Hay and Lord Pauncefote.

Criticism of a policy of neutralization must be aimed at the provisions of the Clayton-Bulwer treaty as well as against those of the convention of 1900. If it be assumed that the former is now binding on the United States, and yet detrimental to our national interests, and if England be unwilling to yield more than is conceded in the unamended convention of this year, how may the United States rightfully secure control over an isthmian canal? The only way by which such an end may be accomplished is by the offer of some consideration in exchange for the greater concessions desired. What Great Britain has relinquished in Central America during the past half century might be thought to be the measure of compensation. A sacrifice such as the relinquishment of certain of our territorial claims in Alaska might be required. It is not to be denied that the United States has the power to construct a canal across the isthmus, and that if it should undertake such a work, England for reasons of her own might long hesitate to interfere by force of arms. What the United States has the power to do in Central America, and what the United States has the right to do under its treaty stipulations, are not identical. International obligations imposed by treaty do not owe their existence solely to the strong arm by which they may be enforced. If our government is bound by the Clayton-Bulwer treaty not to construct and exclusively control an isthmian canal, it is bound simply because it has agreed not to do that very thing. The ratification of the terms of the compact, and not the physical strength of the nation, indicates the reality of the obligation.

Recognition of such a principle is of the essence of the Hay-

Pauncefote convention. Its great significance in American diplomacy lies not in its provisions for the neutralization of an inter-oceanic waterway, nor in the arrangements for the immediate construction of a canal under our own auspices, but rather in its acknowledgment that the basis for all Anglo-American negotiations in regard to isthmian affairs is the terms of the compact of 1850. Press reports indicate that this was willingly agreed to if not suggested by Mr. Hay. It may be urged that his advocacy of a plan of neutralization led him to such a course for reasons of policy rather than of necessity or duty. Whatever motives may have influenced the Secretary of State, the fact remains that the convention signed on the fifth of February shows that this government feels itself bound by its early agreement. Senatorial action cannot affect this. Whether that body reject the traditional policy of neutralization and attempt to realize visions of American control by the incorporation of the amendment suggested, or whether the British government be unwilling to acquiesce in the treaty thus modified, the work of Mr. Hay and Lord Pauncefote will remain. Of course no unratified convention can bind the United States. Nevertheless, an unratified convention may exercise great influence. That of February fifth is of such kind. It signifies to the American people, as well as to Congress, that legislative action with respect to an isthmian waterway, and yet without regard for the Clayton-Bulwer treaty, is improper if not unworthy of American statesmanship; it gives to England no small assurance that this government is proof against a popular yearning to seize an isthmian route and control it irrespective of British consent; finally, it is a declaration to other friendly states that the United States intends to observe its contracts, and that it regards a treaty, in a sense larger than that implied in the Constitution, as "the supreme law of the land."

Charles Cheney Hyde.

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EXCLUSIVE PRIVILEGES GRANTED BY A CARRIER. — A recent decision in Minnesota involves an important question as to the rights of a common carrier to exploit its passengers for its own profit. The defendant, a terminal company, contracted with the proprietor of a livery stable that he should have the exclusive privilege of soliciting patronage within the station. The plaintiff, a rival hackman, having insisted upon soliciting within the station, was ejected by the defendant. It was held that the grant of such an exclusive privilege was lawful. *Godbout v. St. Paul Union Depot Co.*, 81 N. W. Rep. 835 (Minn.).

By the great weight of authority, a railroad company may not allow any particular hackman or expressman to occupy a favored portion of its platform to the exclusion of all others who wish to solicit trade, on the ground that it is virtually subjecting the travelling public to a monopoly. On the other hand, it is settled law that a common carrier may lawfully grant exclusive privileges of furnishing refreshments, papers, and the like within its station, and of soliciting patronage upon its trains. In regard to such things, the railroad is under no obligation to the public, and consequently it may sell them out to the highest bidder. Concerning matters necessarily connected with its public employment of transportation, a carrier may not itself make a profit at the expense of the convenience of its passengers, for that is a violation of its duty to the public. Clearly it is a part of the duty of a railroad — and a terminal company, though not a common carrier, is under a similar public duty — to furnish its passengers with free ingress and egress to and from its trains. Nor can it be said to have provided an unrestricted exit when the most convenient part of the platform is occupied by one favored hackman; for a passenger, if not forced, is at least persuaded, to employ that particular one by reason of the greater difficulty attendant upon procuring the services of rival hackmen. The travelling public, therefore, loses its right to the advantage of

free competition and is practically subjected to a monopoly. Indeed, that is the very purpose of the restriction. Such a regulation would consequently seem to be unlawful. *State v. Reed*, 76 Miss. 211; *McConnell v. Pedigo*, 92 Ky. 465; 7 HARVARD LAW REVIEW, 494. Of the few cases to the contrary, there is but one in a court of last resort. *Railroad Co. v. Tripp*, 147 Mass. 35. The English cases on the subject are not applicable, as they are governed by the Railway and Traffic Act.

In the principal case the court sought to draw a distinction because, although one man was given the exclusive privilege of soliciting trade within the station, all were allowed the same platform facilities outside; therefore, it was urged, the circumstances were similar to the case of soliciting upon the train. Yet this does not seem to be true. While upon the train the passenger is under no necessity of providing for further transportation, and the carrier owes him no duty in that regard. As soon as he reaches the station, however, this need arises, and he hires a cab as soon as he sees a cabman, without waiting until he reaches the cabs outside of the station. Hence the greater facilities for employing the favored hackman create that virtual monopoly which is the ground of objection. On principle and authority, therefore, the case might better have been decided the other way.

INDORSEMENT UNDER AN ASSUMED NAME.—A recent case raises a very neat question with regard to the passing of title to a negotiable instrument by indorsement under an assumed name. *The First National Bank of Fort Worth, Texas, v. The American Exchange National Bank*, New York Supreme Court, Appellate Division, New York Law Journal, March 26, 1900. A swindler, writing from Fort Worth, Texas, signing himself A. W. Hudson, and fraudulently representing that he was the A. W. Hudson who actually owned certain real estate in Denver, managed after a prolonged correspondence with a broker in Denver to secure a loan of money on the supposed security of the Denver real estate. A draft on the defendant bank payable to A. W. Hudson was forwarded to Fort Worth, where it was received by the writer of the correspondence. He endorsed it to the plaintiff, a purchaser for value without notice of the fraud. The court held that the plaintiff, having purchased the draft *bona fide* from the person to whom it was sent and for whom it was intended, had secured a valid title.

In this and analogous cases the question as to whether a good title was passed to a *bona fide* purchaser depends on whether the indorser was or was not the person whom the drawer intended to designate as payee. In general the name of the payee designates him sufficiently, but the difficulty comes when the name inserted is not the true name of the person claiming to be payee. In such cases there may be other grounds of identification. Thus, where one is personally present, and a negotiable instrument is delivered to him by the maker who intends him to be the payee, he gets title, even though the instrument was made payable to a different person whose name the swindler had fraudulently assumed. Personal presence is regarded as a means of identification even surer than one's name. *Robertson v. Coleman*, 141 Mass. 231. But where one who is not personally present is designated by a name, the name is generally the only ground of identification, and only the person possessing that name can pass a good title. *Armstrong v. National Bank*, 46 Ohio St. 512.

These principles are familiar in the law of sales. *Edmunds v. Merchants' Transportation Co.*, 135 Mass. 283; *Barker v. Dinsmore*, 72 Pa. 427.

In the principal case there are two views which may be taken in determining whether the person whom the drawer intended to designate as payee was identical with the absent impostor who indorsed as payee: Did the drawer intend to make the draft payable to the person with whom the correspondence had been carried on, erroneously supposing him to be owner of the Denver real estate? Or did he intend the owner of the land to be payee, regardless of the man with whom the correspondence had been conducted? The court took the first of these two views, without considering the second, remarking that the facts were the same as if the swindler had been personally present. It is, however, evident that a distant correspondent can by no means be so clearly identified as a man present in person. The question as to which view more accurately represents the intention of the drawer is extremely close, and deserved further consideration than it received. Considering the favor with which a purchaser for value is regarded, the view taken in the principal case is probably the better; but if the evidence, which is very scantily given, showed that the drawer had from outside sources a distinct conception of the real A. W. Hudson, the owner of the real estate, and did not rely merely on the representations made in the correspondence, the case might well have gone the other way. *Cundy v. Lindsay*, 3 App. Cas. 459.

RECOVERY BY A MARRIED WOMAN FOR THE IMPAIRMENT OF HER EARNING CAPACITY. — An interesting question arising under the modern married women's property acts concerns the right of a married woman to recover damages for the impairment of her capacity to perform labor outside of her ordinary household work. At common law it is the husband only who can recover in such instance. He is absolutely entitled not only to the services of the wife in connection with the family, but also to whatever she may earn outside. *Buckley v. Collier*, 1 Salk. 114. Consequently, when the wife is injured, he may recover in a lump sum for the loss he sustains from his wife's inability to work for him or for others. But in the flood of legislation which has so completely altered the status of the married woman, it is in general expressly provided that the earnings of a wife from work performed on her sole and separate account shall remain her own, free from her husband's control. Under such a statute it has recently been held that, in an action by a married woman to recover for personal injuries, damages should be given for the impairment of her capacity to work outside the household. *Texas & Pacific Railway Co. v. Humble*, 97 Fed. Rep. 837 (C. C. A., Eighth Cir.). The conclusion reached in this case would seem to follow logically from the statute. If the earnings of a married woman for such outside work are no longer the property of the husband, but belong absolutely to his wife, it follows that she is the proper person to recover for the money she would have earned but for her incapacity. It is true that in many instances a married woman never has worked outside the household, and the probability that she will do so is too slight to allow recovery. Yet it is for the jury to assess in each case the value of the work which the plaintiff would probably have performed. The principal case represents the weight of authority. *Harmon v. Old Colony R. R. Co.*, 165 Mass. 100; *Brooks v. Schwerin*, 54 N. Y. 343.

The real objection to allowing the wife to recover is based on practical grounds. The right to recover for the services which the wife would probably have rendered in the household still belongs to the husband. *Mewhirter v. Hatten*, 42 Iowa, 288. Now, where the wife recovers for her incapacity to work outside the family, and the husband recovers for her incapacity to work in the household, it is almost inevitable that juries will allow a lapping over of one ground of recovery on the other, thus inflicting upon the defendant double damages. The more work a wife is likely to do in the household, the less is she likely to perform outside, and there should therefore be a total sum, equal to what the husband would recover at common law, above which the value of her entire capacity to labor should not ascend. Yet this is not likely to be regarded by juries, especially when the trials by the husband and wife are separately conducted. Admitting, however, as we must, that the principal case is correct, the difficulty of double damages might well be minimized by legislative enactment compelling the actions to be joined, or providing some short period of limitations for bringing them, making it necessary that both should be pending at the same time.

LIABILITY FOR THE NEGLIGENCE OF AN INDEPENDENT CONTRACTOR. — The rule is generally stated that an employer is not liable for the negligence of an independent contractor except in three cases: where the act the contractor is employed to do is one which, if done by the employer, would be done at his peril; where the contractor is employed to execute certain work which the employer is under a statutory duty to perform; where the work which the contractor is employed to do is unlawful or a public nuisance. *Engell v. Eureka Club*, 137 N. Y. 100. In cases other than the above, when the injury is due to the collateral negligence of the contractor, the employer is not liable. *Connors v. Hennessy*, 112 Mass. 96.

These exceptions seem to have been considerably extended in a recent case, *Covington Bridge Co. v. Steinbrook*, 55 N. E. Rep. 618 (Ohio). The defendant had employed a contractor to tear down a building that was partially destroyed by fire. When the building had been so far torn down as to leave it in a dangerous condition, the contractor employed a sub-contractor to complete the contract. Owing to the negligence of the latter, part of a wall fell and damaged the plaintiff's house which adjoined. The defendant was held liable for the injury on the broad principle that one employing a contractor cannot escape liability for an injury that might have been anticipated as a probable consequence if reasonable care were omitted in the performance of the contract. Though the court professed to recognize the independent contractor principle, there is probably no kind of contract in which a negligent act of the contractor may not work an injury, and the language of the court is certainly broad enough to extend to all. Unless, indeed, it was intended to restrict the rule of the principal case to building contracts, — an intent which nowhere appears in the decision, — the principle may for all practical purposes be regarded as abrogated in Ohio.

There seems to have grown up a more or less well recognized rule that where the contract contemplates labor to be done on a highway, the employer owes the public the duty of an insurer against the contractor's negligence. *Hill v. Tottenham*, 106 L. T. Rep. 127; *Penny v. Wimbledon*

Council, [1899] 2 Q. B. 72; *Halliday v. Telephone Co.*, [1899] 2 Q. B. 392; *The Snark*, [1899] P. D. 74. And those who thus interfere, though lawfully, with the public's superior right to the use of the way, may well be held to this increased liability. But in other cases, where the act is one which the employer himself from a lack of the requisite skill could not perform, it is surely unjust to hold him liable for the negligence of a contractor, in the selection of whom he has used due diligence. On the introduction of the independent contractor exception, it appeared to be of considerable extent, but the tendency in many jurisdictions is greatly to qualify it, and place it more and more in line with the rules governing master and servant. As the doctrine does not seem to have outlived its usefulness, it is satisfactory to note that the weight of authority, in this country at least, is still against the principal case.

MARRIAGE CONTRACTS AND THE STATUTE OF FRAUDS. — Mutual promises to marry have been generally treated by the courts as subject to the same rules as ordinary business contracts. But, in a recent Maryland case, it was held that the section of the Statute of Frauds forbidding action to be brought on any agreement, not to be performed within one year, unless evidenced by a written agreement, does not include marriage contracts. *Lewis v. Tapman*, 44 Atl. Rep. 459 (Md.). The grounds for the decision were, first, that in 1676, when the Statute of Frauds was passed, it being unsettled that an action could be maintained at common law on marriage agreements, it is not legitimate to infer that parliament intended to include such contracts, and, secondly, that, since the contract affects the very basis of society, it should not be massed with other contracts under the general head of "any agreement."

In the seventeenth century, marriage itself having been under the sole cognizance of the ecclesiastical courts for five hundred years, there was considerable dispute as to whether anything so closely akin to it as the contract to marry should come under common law jurisdiction. An action on such a contract, however, was allowed in 1639, *Stretch v. Parker*, Rolle, Abr. 22, and again in 1672, *Holcroft v. Dickenson*, 1 Cart. 233. In 1676, therefore, when the statute was passed, had parliament intended to exclude such contracts, it seems that the intention would have been clearly expressed. Further, as the clause of the statute regarding agreements in consideration of marriage was held in 1679 to include the marriage contract, *Philpot v. Wolcott*, Skinner, 24, an interpretation later overruled, it appears that the courts did not then regard the marriage agreement as excluded by parliament. Nor can a better justification be found in any essential difference in nature. That it is unusual and unnatural to find exact written evidence of marriage promises, may be an argument for expressly excepting them from the statute; but on the other hand this usual lack of exact evidence makes such contracts most likely to be subject to the very fraud, perjury, or half unconscious misstatement, after the lapse of a considerable time, that the statute was constructed to prevent. To bring the contract into court is to treat it as a business agreement, and it is, therefore, not unfair to insist on the same evidence that is required in all business agreements.

The point has apparently never been decided in England. In America it is generally held that the marriage contract is within the statute. *Derby v. Phelps*, 2 N. H. 515; *Nichols v. Weaver*, 7 Kan. 373; *Ullman*

v. *Meyer*, 10 Fed. 241 (Cir. Ct., N. Y.). In New York and Illinois the contrary view has prevailed, in the one state, because the local statute refers only to "transactions affecting personal property," *Brick v. Gan-
nar*, 36 Hun, 52; and in the other because the contract was regarded as "continuing," and so beyond the statute's provisions. *Blackburn v. Mann*, 85 Ill. 222. The distinction drawn in the principal case, therefore, does not seem to be justifiable.

PART PERFORMANCE OF A PAROL CONTRACT TO CONVEY LAND. — It is a general rule of equity that, in order to take a parol contract for the conveyance of land out of the Statute of Frauds, there must be such a part performance by the plaintiff as to make it a fraud upon him if the contract be not enforced. If adequate compensation can be had in money damages, he is left to his action of quasi-contract. Yet, where the plaintiff has altered his position in such a way that no pecuniary payment can make up for the loss incurred, equity will decree specific performance, on the ground that it will not suffer the Statute of Frauds to be made an instrument of injustice. Although the mere payment of the purchase-money, therefore, is insufficient, if the purchaser has taken possession in pursuance of the oral agreement, the seller can be compelled to grant a conveyance of the property on the ground that otherwise the plaintiff would suffer an irreparable injury.

Whether the same rule should ever be applied where the performance has been the giving of personal services is a question of some difficulty. In a late case the defendant's intestate, while suffering from an offensive disease, made an oral agreement to convey land to the plaintiff in consideration of care during the rest of his life. The plaintiff, who had duly performed her part of the contract, obtained a decree for specific performance. *Lothrop v. Marble*, 81 N. W. Rep. 885 (S. D.). This decision is in accord with the doctrine generally accepted in America. *Rhodes v. Rhodes*, 3 Sandf. Ch. 279; *Davison v. Davison*, 13 N. J. Eq. 246. The English rule is that specific performance will be decreed only where the act of part performance is of such a nature as to point exclusively to a contract like that set up; hence personal services are not sufficient, for they might have been rendered equally well in the expectation of pecuniary reward. *Maddison v. Alderson*, 8 App. Cas. 467. Although this distinction seems unsatisfactory, the English view is supportable on the broader ground that such services may in fact be adequately compensated in money damages. Where a prospective purchaser has entered into possession of land, not only has he acquired a sentimental interest in the property itself, but he has also made various expenditures for the enjoyment of his ownership, many of which are of no value to the defendant. The plaintiff is a loser, therefore, unless he can obtain specific performance; for it is the gain of the defendant, and not the plaintiff's outlay, which is the basis of an action of quasi-contract. In the matter of nursing an invalid, however, the defendant has received the benefit of all the sacrifice and expenditure of the plaintiff, and thus the full amount can be recovered in quasi-contract. The granting of this form of equitable relief against the Statute of Frauds, being in the nature of judicial legislation, should not be extended beyond the bounds of strict necessity. The wisdom of the American view, therefore, in regard to contracts of personal service, may well be questioned.

DEDICATION OF LAND TO THE PUBLIC. — The doctrine concerning the dedication of land by an owner to the use of the public has been a source of much perplexity to the courts. Where the matter is not controlled by statute, it is the more general view that, in order to effect a binding dedication, such that the rights and liabilities of the owner are superseded by the rights and liabilities of the public, the transaction must be bilateral; there must be some act on the part of the dedicator showing a clear intent to dedicate, and some act of acceptance on the part of the public. No formality is necessary on either side. The dedication may be by parol; and the acceptance by mere user by the public as public property, for however short a period. *Stewart v. Conley*, 27 So. Rep. 303 (Ala.); 7 HARVARD LAW REVIEW, 44.

A recent case illustrates the nature of the transaction. *Pittsburg v. Epping-Carpenter Co.*, 45 Atl. Rep. 129 (Penn.). The dedicator drew up a plat of certain premises, leaving a strip along a river as a place for a public wharf. The court held that acceptance was necessary to complete the dedication. It was said that user by the public and repair by the municipal authorities were valid modes of acceptance; and, further, that the dedication was also made binding on the dedicator by reason of the sale of lots by him in accordance with the plat. This last view, based on the theory of estoppel, was relied upon in one of the earliest American cases, *Cincinnati v. White*, 6 Pet. 431; but it is open to the objection that the public in general has not altered its position in reliance on the plat, and the estoppel would seem to run, then, not in favor of the public, but only of those individuals who purchased lands.

Much of the difficulty in connection with this subject seems to come from attempting to reconcile it with the theories of transfer of property between individuals. Dedication is usually likened to a grant, but it has many peculiarities which make it utterly irreconcilable with such a view. There need be no deed or writing to complete a dedication, nor is there any definite grantee. Moreover, while it is generally law, and a thoroughly practical doctrine, that, in the absence of an express dedication, the public may nevertheless gain a right to use a private road by a twenty years' user by analogy to the Statute of Limitations (*Jennings v. Tilsbury*, 5 Gray, 73), yet on the theory by which similar private rights are gained this would be indefensible, since the owner of the land could manifestly not sue the indeterminate public during the period, and the user would therefore not be legally adverse. It would make for clearness to recognize that the subject of dedication must be given a distinct and independent position among the different methods of the transfer of real estate, and must be treated on a broad basis, according to the rules which have been formulated concerning it, not seeking to draw a too close analogy to similar methods of transfer between individuals.

STOPPAGE IN TRANSITU. — The right to stop *in transitu* was said by Lord Kenyon to be "an equitable lien adopted by the law for the purpose of substantial justice." *Hodgson v. Long*, 7 T. R. 440. A more definite statement of the right would perhaps be that it is a power in the vendor while the goods are in transit to make himself an equitable mortgagee. There was formerly much discussion as to whether the contract of sale is rescinded by a stoppage *in transitu*, but it is now generally admitted that it is not. *Kemp v. Falk*, 7 App. Cas. 573. There are

strong practical reasons for this latter view, as in the case of a decline in the value of the goods the vendor under it is entitled to recover his loss from the vendee, while of course if the contract were rescinded he could not. In a recent case the vendor had stopped the goods in transit and sold them, without notice to the vendee, for less than the contract price. In an action brought for the deficiency the defendant demurred to a declaration setting out the above facts, and the demurrer was sustained. *Davis Sulphur Co. v. Atlanta Guano Co.*, 34 S. E. Rep. 1011 (Ga.). The court denied that stoppage *in transitu* rescinded the contract, but it seems difficult to sustain the decision on any other theory.

Where a mortgagee wrongfully sells the property mortgaged for less than the mortgage debt and sues for the debt, the mortgagor undoubtedly has an equitable right to set off the amount the mortgagee received for the goods, or, if they were sold for less than their fair market value, the set-off would be of what they were worth at the time of the sale. The vendor in the principal case, after the stoppage, occupied the position of a mortgagee, and, even though the sale were wrongful by reason of failure to give notice, he would still be entitled to the difference between the contract price and the market value of the goods at the time of the sale. But where the goods are perishable, or subject to rapid fluctuations in value, it seems only equitable to allow the vendor to resell the goods without waiting to notify the vendee. *Diem v. Koblitz*, 49 Ohio St. 41. It would indeed be strange for equity to give the vendor the right to stop *in transitu* and at the same time to hedge it with such restrictions as greatly to impair or, in many cases, altogether destroy its value. Consequently the duty is on the defendant to set up the equitable defence that the sale by the plaintiff was made under such circumstances as to be unjustifiable, and that the contract price was not greater than the fair market value of the goods at the time of the resale. The demurrer to the declaration in the principal case, therefore, should have been overruled.

LIABILITY FOR NEGLIGENT FALSE STATEMENTS. — How far liability exists, apart from contract, for damages resulting from action on negligent, but not fraudulent, false statements, made with the intention or knowledge that they will be acted upon, is extremely unsettled. In a recent case, the plaintiff, relying on the negligent statement of the defendant, a physician, that she incurred no danger, dressed a malignant sore, for which the defendant was treating her husband, and thereby became infected. In an action brought for the injury, the defendant was held liable. *Edwards v. Lamb*, 45 Atl. Rep. 480 (N. H.). Had the defendant gratuitously operated on the plaintiff, and negligently injured her, his liability would have been undoubted. The question is, does liability disappear when the negligence is in words? The English courts have accepted the dictum in *Peck v. Derry*, 14 App. Cas. 337, that no liability exists for false statements not known to be false. *Angus v. Clifford*, [1891] 2 Ch. 449. In America some states have taken the same view. *Marsh v. Fuller*, 40 N. Y. 562; *Hubbard v. Weare*, 44 N. W. Rep. 915 (Ia.); others have openly declared that negligent false statements, intended to be acted upon, cause liability for any resulting damage. *Houston v. Thornton*, 29 S. E. Rep. 827 (N. C.); *Harriott v. Plimpton*, 166 Mass. 585. Some few states have reached this same result by conclusively presuming knowledge where the truth ought to have been known, and so finding fraud.

Watson v. Jones, 25 S. E. Rep. 678 (Fla.) ; *Cotzhausen v. Simon*, 47 Wis. 103.

The broader doctrine, according to which the principal case was decided, seems, theoretically and practically, to be sound. If a man is held liable where his acts cause damage as a reasonable and probable consequence, it is just that he should similarly be held liable where his words, through another's acting on them as intended, have the same consequence. A physician cannot rightly be absolved from liability for damage resulting from his negligence, because he advises a certain course of conduct instead of administering medicine or performing an operation. In both cases it is his negligent acts, for words are acts, which cause the damage. And the difficulty of deciding what is negligent statement is no greater than the difficulty, with which juries now successfully contend, of deciding what is negligent conduct. As civilization progresses, every one must depend more and more on the statements of experts. These men should be held to as high a standard of care as bridge-builders, railroad managers, or others whose work consists in acts, as distinguished from words, for on the carefulness of both alike the well-being of the community depends. In England the courts will probably feel bound to follow the dictum in *Peck v. Derry*, *supra*, at least until its authority becomes quietly dissipated by not being followed in spirit. But in America, where the question is still practically unsettled, it is to be hoped that the courts will accept the broad doctrine that negligent statements, made with the intention or knowledge that they will be acted upon in matters of importance, cause liability for damage resulting from such action.

THE LIABILITY OF TRUST ESTATES FOR TORTS OF THE TRUSTEE. — An interesting question was presented in a recent case, *Re Raybould*, [1900] 1 Ch. 199. A trustee, while working a colliery for the benefit of the trust estate, caused, without personal negligence on his part, a subsidence of the plaintiff's adjoining property. The plaintiff recovered judgment against the trustee for the damage. It was held that since the trustee was entitled to be indemnified out of the trust estate, the plaintiff could have the benefit of this right and obtain payment of the judgment directly out of the trust estate.

This decision was very severely criticised in a recent number of the *Law Times* (March 17th, 1900). The decision was said to be based on a subrogation of the plaintiff to the trustee's right to indemnity. Yet the court did not profess to place the decision on that doctrine, and there would not seem to be the slightest element of subrogation involved. The right to be subrogated to a claim exists only where a person in a position analogous to that of surety is compelled either by his obligation or his own interest to satisfy that claim. It is based on a presumed assignment of the claim to him in consequence of his having paid the original claimant, and cannot therefore exist before there is actual payment. So far is the principal case from being one of subrogation that the right here exists before payment by the trustee — had there been payment, no right against the trust estate could arise. The true explanation of the principal case, as well as of the large class of cases holding that where debts are incurred by a trustee authorized to carry on a business for the benefit of the trust estate, creditors can proceed directly against the estate, is that

they are all actions for an equitable execution. The creditor has a claim against the trustee, who in turn has a right of exoneration from any liability incurred by him without fault in managing the estate. This right is not merely one of reimbursement, but the trustee is entitled to apply the income of the trust estate to discharge the claim. There is therefore no reason why the creditor may not, by an equitable execution, apply this right of exoneration to the satisfaction of his own claim. True, no general creditor of the trustee can get at this right of exoneration, but that is owing to its peculiar nature; it is a right against the trust estate solely for the purpose of satisfying that particular claim.

It does not appear in the principal case that the trustee was expressly authorized by the testator to carry on a business for the benefit of the trust estate; but though *Worrall v. Harford*, 8 Vesey, 4, which limited the right of recovery to liabilities incurred in such a business, was cited, it is perhaps too much to infer that the court meant to dissent from that and similar decisions. In the United States this limitation has been generally disregarded, and properly, for it is purely arbitrary and at the same time unjust. The principal case is, at all events, a long step towards a consistent doctrine.

RECENT CASES.

AGENCY — INDEPENDENT CONTRACTOR — NEGLIGENCE. — Through the negligence of an independent contractor employed by the defendant to tear down a building, part of a wall fell, damaging the plaintiff's building. *Held*, that the defendant is liable though he used due care in selecting a competent contractor. *Covington Bridge Co. v. Steinbrook*, 55 N. E. Rep. 618 (Ohio). See NOTES.

AGENCY — UNDISCLOSED PRINCIPAL — ELECTION. — *Held*, that an unsatisfied judgment against an agent, obtained in ignorance of the existence of his undisclosed principal, is no bar to a subsequent action against the principal. *Brown v. Reiman*, 62 N. Y. Supp. 663 (Sup. Ct., App. Div., Fourth Dept.).

There is very little authority on the point in this country. *Beymer v. Bonsall*, 79 Pa. St. 298, is probably in accord with the principal case, though the decision is not quite clear. The English courts, however, maintain the opposite view. *Priestley v. Fernie*, 3 H. & C. 977. While the present case is clearly correct in holding that the plaintiff could not make an election without knowing of his right against the principal, nevertheless recovery might well have been denied on the ground that the plaintiff's cause of action had become merged in the judgment against the agent. His right is really a single contractual claim on which by an anomaly he is allowed to proceed against either the agent or the principal; but as soon as this claim is turned into a judgment against one, it is gone, and there is no longer any basis for an action against the other. See *Kendall v. Hamilton*, 4 App. Cas. 504, 514.

AGENCY — WRONGFUL SALE — INNOCENT PURCHASER. — The plaintiff consigned goods to a retail grocer to sell on commission in the ordinary course of his business. The consignee immediately sold the entire stock for cash to the defendant, who had no notice of the agency. *Held*, that the plaintiff can maintain replevin. *Romeo v. Martucci*, 45 Atl. Rep. 1 & 99 (Conn.).

Apparently the precise point here involved has never before been decided, but, on principle, the case can hardly be supported. The court relies upon the well-settled law that a factor cannot pass the title of his principal by a pledge or barter. *Kinder v. Shaw*, 2 Mass. 397; *Guneiro v. Peile*, 3 B. & Ald. 616. These decisions are, however, based on the fact that such acts are not naturally incident to a power of sale, and hence no authority can be implied. But in the principal case there is no need for an implied authority, since the consignee has an express power to sell. The limitation of this authority to sales at retail should be no more effective against a purchaser ignorant

of the restriction than would instructions to sell only at a certain price. *Whitehead v. Tuckett*, 15 East, 400. Moreover, where the decisions are not expressly binding, it seems that the court might well, by protecting the innocent purchaser, reach the result which is proved by the factor's acts to be commercially desirable.

BANKRUPTCY — CORPORATIONS — ACT OF BANKRUPTCY. — *Held*, that an application by an insolvent corporation for the appointment of a receiver under a state law is not an act of bankruptcy. *In re Empire Metallic Bedstead Co.*, 98 Fed. Rep. 981 (C. C. A., Second Cir.).

Under the Bankruptcy Act of 1867 the opposite result was reached. *In re Bininger*, Fed. Cas. 1420; Lowell, Bankr. 25. The decisions under the Act of 1898 are conflicting. In accord with the principal case, see *In re Baker Ricketson Co.*, 97 Fed. Rep. 489 (Dist. Ct., Mass.). *Contra*, *Mather v. Coe*, 92 Fed. Rep. 333, (Dist. Ct., Ohio). The earlier Act provided in § 39 that a person may be declared an involuntary bankrupt "if he suffers his property to be taken on judicial process with intent to give a preference." The application for a dissolution was held to be a judicial process. The present Act in § 3 d (3) contains a substantially similar provision declaring it an act of bankruptcy "to suffer any creditor to obtain a preference through legal proceedings." Therefore an application for the appointment of a receiver ought to be considered an act of bankruptcy if the provisions of the state insolvency law give precedence to claims of creditors other than those entitled thereto by the national Act, for in that case the application would result in giving preferences. Since this appears to be true under the New York statutes, 1 Rev. Stat., 2 ed., 669, the principal case seems incorrect.

BANKRUPTCY — PREFERENCES — TRANSFERS PURSUANT TO PRIOR CONTRACT. — The plaintiff advanced money to the defendant's assignor in bankruptcy, and the latter contracted to transfer certain personal property to the plaintiff unless the loans were repaid within a specified time. The debtor failed to pay, and, within four months before he filed a petition in bankruptcy, transferred the property to the plaintiff. *Held*, that the conveyance is not a preference. *Subin v. Camp*, 98 Fed. Rep. 974 (Cir. Ct., Oreg.).

The decision seems incorrect. Both the Bankruptcy Act of 1867 and that of 1898 declare that conveyances amounting to preferences are void if made within four months before the filing of the petition. Act of 1898, § 60 b; Act of 1867, § 35. Nevertheless, under the earlier Act it was held that a transfer, though within the four months, was valid if made according to a prior agreement which equity would specifically enforce. *In re Jackson Iron Mfg. Co.*, 15 N. B. R. 438; *Douglas v. Vogeler*, 6 Fed. Rep. 53. The Act of 1898, § 70 (3), defines the property which rests in the assignee as that on which the bankrupt's creditors could levy. But this should not alter the law, for property is not subject to attachment if an agreement by the debtor to convey it can be specifically enforced. 2 Freem. Judg. § 397. Equity would not have enforced the contract in the principal case, however, since its subject-matter is personality, and, therefore, the transfer to the plaintiff should have been held a preference and void. *In re Sheridan*, 98 Fed. Rep. 406.

CARRIERS — NEGLIGENCE — PERSONS NOT PASSENGERS. — The plaintiff, who had boarded a train for the purpose of speaking to a passenger, was injured by the negligence of the railway. *Held*, that the company is not liable, since its employees had no notice of her presence. *Bullock v. Houston, etc. Ry. Co.*, 55 S. W. Rep. 184 (Tex., Civ. App.).

By the weight of authority, the carrier is under a duty, irrespective of notice, to use the same care toward persons for whom the passenger may demand access to the train that he must use toward the passenger. *Little Rock, etc. R. R. Co. v. Lawton*, 55 Ark. 428; *Louisville, etc. Ry. Co. v. Crunk*, 119 Ind. 542. The principal case is a novel attempt to include mere social visitors among such persons. The right has not, however, been extended by the decisions beyond cases where the assistance of the third person is reasonably necessary to aid the passenger to enter or leave the car, since the public duty of the carrier covers only such matters as are incidental to the carriage. *Doss v. Missouri, etc. Ry. Co.*, 59 Mo. 27; *Whitbey v. Southern Ry. Co.*, 122 N. C. 987. Here, therefore, there should be no more than the ordinary liability of a landowner, and, as there is, generally speaking, no duty to anticipate trespasses, the decision is correct. *Palmer v. Northern Pacific R. R. Co.*, 37 Minn. 223.

CARRIERS — PUBLIC DUTY — EXCLUSIVE PRIVILEGES. — *Held*, that a common carrier may grant to a hackman the exclusive privilege of soliciting patronage within its station. *Godbout v. Saint Paul, etc. Co.*, 81 N. W. Rep. 835 (Minn.). See NOTES.

CARRIERS — TICKETS — MISTAKE. — The defendant's ticket agent by mistake gave the plaintiff, instead of an unlimited ticket, one which was void after a certain date. After that time the conductor refused the ticket, and ejected the plaintiff upon his failure to pay fare. *Held*, that the plaintiff may recover for being ejected. *Walker v. Price*, 59 Pac. Rep. 1102 (Kan., C. A.).

The doctrine of this case has some support. *Kansas, etc. Ry. Co. v. Riley*, 68 Miss. 675; *Georgia Ry. Co. v. Dougherty*, 86 Ga. 744. The great weight of authority is, however, that a ticket when presented on the train is governed by the terms on its face, regardless of the mistake of the selling agent. *Bradshaw v. South Boston R. R. Co.*, 135 Mass. 407; *Townsend v. New York, etc. R. R. Co.*, 56 N. Y. 295. This seems the sounder view, for the carrier in issuing the ticket merely undertakes to accept it according to its terms in discharge of the holder's common law obligation to pay fare. Therefore, when a ticket is presented which is on its face invalid, the holder has no right to ride without paying on the train, and the company should be justified in ejecting him. The purchaser, of course, has his remedy either in tort for the negligent misrepresentation of the ticket agent, or in contract for breach of the implied warranty. *Frederick v. Marquette, etc. R. R. Co.*, 37 Mich. 342; *Hutch. Carriers*, 2d ed., 580k.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — TAXATION OF BROKERS. — A municipal ordinance imposed a license tax on brokers of merchandise. The defendant was a broker engaged exclusively in selling goods which were in another state. *Held*, that as to him the tax is void as a regulation of interstate commerce. *Adams v. Richmond*, 34 S. E. Rep. 967 (Va.).

Decisions similar to that in the principal case have been made by the United States Supreme Court in regard to taxes on travelling salesmen. *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *Brennan v. Titusville*, 153 U. S. 489. In another case, however, the same court intimated that this objection did not apply to a tax on the business of a resident of the state, though the business was the negotiation of sales of property in other states. *Ficklen v. Shelby County Taxing District*, 145 U. S. 1. Moreover, the validity of a tax on auction sales of goods brought from another state has been sustained though the goods were sold in the original packages, since the same tax was imposed on domestic goods. *Woodruff v. Parham*, 8 Wall. 123. This last case seems to state the sound view. A tax like that in the principal case, which is reasonable in amount and does not discriminate in favor of domestic goods, imposes no restrictions on interstate commerce, and it is difficult to believe that the commerce clause was intended to prevent such a use of the taxing power. But the test of discrimination was repudiated in the case of the tax on drummers, cited *supra*, and, while it appears not to be wholly abandoned, its scope is somewhat uncertain. Moreover, the distinction suggested in *Ficklen v. Shelby County Taxing District*, *supra*, indicates that the question decided in the principal case is still open in the United States Supreme Court. Accordingly, it would seem that a proper deference to the legislative authority of the state, as well as the desirability of preserving the right of appeal, should have led to a decision in favor of the tax. *The Tonnage Tax Cases*, 62 Pa. St. 286.

CONTRACTS — AGREEMENT TO ARBITRATE. — *Held*, that an agreement to submit all disputes that might arise under a contract to arbitrators for final decision is void. *Jason v. Wright*, 55 S. W. Rep. 202 (Ky.).

The courts usually distinguish between agreements like the present and agreements to submit questions of fact to arbitration. In the latter case the weight of authority is in favor of giving effect to the provision as a condition precedent and allowing no recovery except on the arbitration award. *Scott v. Avery*, 5 H. L. C. 811; *Delaware, etc. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250. As the arbitrators are much more likely to be accurate than is the ordinary jury, it seems that the courts should give effect to all agreements which can be reasonably so construed. Where, however, as in the principal case, the agreement extends to questions of law, its effect is to deprive the courts entirely of jurisdiction in the field for which they are established, and it should therefore be held void. *Vass v. Wales*, 129 Mass. 38; *Dawson v. Fitzgerald*, 1 Exch. Div. 257. Under such an agreement, questions of fact cannot be left to the decision of arbitrators, because the contract as made covers all disputes, and this would be changing its terms without the consent of the parties.

CONTRACTS — MUTUAL PROMISES TO MARRY — STATUTE OF FRAUDS. — *Held*, that a contract of marriage is not within the clause of the Statute of Frauds which forbids actions on oral agreements not to be performed within one year. *Lewis v. Tapman*, 45 Atl. Rep. 459 (Md.). See NOTES.

EQUITY — CORPORATIONS — SIMILARITY OF NAMES. — The plaintiff, a membership corporation, sought to restrain a similar corporation from using a name so nearly like

its own as to cause confusion. *Held*, that the plaintiff was entitled to an injunction restraining such use. *Society of Eighteen Hundred and Twelve v. Society of 1812 in the State of New York*, 62 N. Y. Supp. 355 (Sup. Ct., App. Div., First Dept.). See NOTES, 13 HARV. LAW REV. 685.

EQUITY — INJUNCTIONS — STREET RAILWAYS. — *Held*, that an injunction will be granted to an abutting property owner who would suffer irreparable injury from the construction and operation of a street railroad under an alleged illegal ordinance. *General Electric Ry. Co. v. Chicago, etc. Ry. Co.*, 98 Fed. Rep. 907 (C. C. A., Seventh Cir.).

This case limits the scope of the rule laid down in *Doane v. Lake St. Elevated R. R. Co.*, 165 Ill. 510, that an abutting owner cannot enjoin the construction of a street railway illegally authorized. In that case, the court was influenced by the delay that might be caused in constructing a railway, if an injunction were to be issued at the request of any owner who could show prospective injury. In the principal case, however, the court holds that such reasoning applies only when there is an adequate remedy at law. Where an injunction would stop a work of public importance, the damage to the plaintiff should be serious. *Drake v. Hudson River R. R. Co.*, 7 Barb. 508. Still, if he can clearly show that money damages would be an insufficient remedy, equity ought not to hesitate to grant relief. *Keystone Bridge Co. v. Summers*, 13 W. Va. 476, 485.

EQUITY — SPECIFIC PERFORMANCE — PAROL CONTRACT TO CONVEY LAND. — The defendant's intestate, while suffering from an offensive disease, made an oral agreement to convey land to the plaintiff in consideration of care during the rest of his life. *Held*, that the plaintiff, having duly performed his part of the contract, was entitled to a decree for specific performance. *Lothrop v. Marble*, 81 N. W. Rep. 885 (S. D.). See NOTES.

EQUITY — VENDOR'S LIEN — ASSIGNMENT OF NOTES. — A vendor of real property took three notes secured by a vendor's lien in payment of the purchase price. He subsequently assigned one of the notes, retaining the others. *Held*, that the assignee's right to be paid out of the property has priority over the vendor's right on the notes retained. 55 S. W. Rep. 526 (Tex., Civ. App.).

By the weight of authority, the assignee in such cases, as well as the similar ones where several notes are secured by a single mortgage, is preferred in the absence of express agreement, on the ground that it would be inequitable to allow the assignor to compete with him. *McClintic v. Wise's Admrs.*, 25 Grat. 448; *Salaman v. Creditors*, 2 Rob. La. 241. On the other hand, some cases, among them earlier Texas decisions, deny such priority, and hold that the proceeds of the lien or mortgage should be divided *pro rata*. *Dixon v. Clayville*, 44 Md. 573; *Wooters v. Hollingsworth*, 58 Tex. 374. On principle, this position seems better, since there appears to be no reason why the assignee should be entitled to priority in cases where there is no agreement to that effect, and nothing to lead him into the belief that he will have this preference. The principal case, however, shows a tendency in Texas courts to follow the more usual rule.

PARTNERSHIP — GARNISHMENT — DEBTS DUE ONE PARTNER. — *Held*, that creditors of a firm cannot by garnishment reach a debt due to one of the partners. *Commercial Nat. Bank v. Kirkwood*, 56 N. E. Rep. 405 (Ill.).

This case holds that only such debts can be reached by garnishment as could be recovered by the judgment debtor himself in an action of debt or *indebitatus assumpsit*. The debt here could not be thus recovered, for it was not due the firm directly. In accord with this view, see *Siegel, Cooper & Co. v. Schneck*, 167 Ill. 522; *Ford v. Detroit Dry Docks Co.*, 50 Mich. 358. On the other hand, some courts hold that, as the property of individual partners may be taken on an execution against the firm, a debt due to one of the partners may be reached by garnishment. *Stevens v. Perry*, 113 Mass. 380; *Pearce v. Shorter*, 50 Ala. 318. The position of the principal case, however, seems preferable, since the garnishment statutes uniformly provide for reaching debts due the debtor, and here clearly the firm, and not the partner, is the debtor.

PERSONS' — LIABILITY OF INFANTS FOR TORTS. — An infant obtained goods on credit by falsely representing himself to be of age. *Held*, that an action of tort will not lie. *Slayton v. Barry*, 56 N. E. Rep. 574 (Mass.).

This case, deciding the point for the first time in Massachusetts, follows the weight of authority. *Nash v. Jewett*, 61 Vt. 501; *Ferguson v. Bobo*, 54 Miss. 121, 131. The view taken is that, since the plaintiff has no remedy on the contract, he ought not to recover in tort, because his deceit really enters into the agreement. His success, therefore, would amount to an evasion of the law as to infants' contracts. In fact, however, the fraud, though inducing the sale, is no part of the contract, but is ante-

cedent to it, and so the infant may be held without enforcing his promise, directly or indirectly. *Fitts v. Hall*, 9 N. H. 441, 449; *Rice v. Boyer*, 108 Ind. 472. Moreover, this result is in conformity with the modern tendency to withdraw the plea of infancy where it is not required as a defence, but is employed, as a weapon for purposes of fraud. Accordingly, it seems that the opposite decision in the principal case would have been preferable.

PERSONS — MARRIED WOMEN — IMPAIRMENT OF EARNING CAPACITY. — Statutes in Arkansas allow a married woman to hold property acquired in her separate business free from her husband's control, and to maintain an action in her own name for any injury to her person, character, or property. *Held*, that in an action for personal injury she may recover damages for the impairment of her earning capacity. *Texas, etc. Ry. Co. v. Humble*, 97 Fed. Rep. 837 (C. C. A., Eighth Cir.). See NOTES.

PROPERTY — ADVERSE POSSESSION — TACKING. — *Held*, that successive adverse possessions may be tacked so as to bar the true owner without further privity than arises out of a parol sale and transfer from one possessor to the other. *Illinois Steel Co. v. Bridgiss*, 81 N. W. Rep. 1027 (Wis.).

Though contrary to the spirit and letter of the Statute of Limitations, the rule requiring some form of privity between successive adverse holders in order to allow tacking has become well settled in this country. 13 HARV. LAW REV. 52. In defining what shall constitute such privity the doctrine of the principal case has been generally adopted. *McNeely v. Langdon*, 22 Oh. St. 32; *Vance v. Wood*, 22 Oreg. 77. Some jurisdictions, however, follow more closely the strict meaning of the term, and require that there must be such a transfer as would pass a good title, if one existed. *Potts v. Gilbert*, 3 Wash. C. C. 475; *Ward v. Bartholemew*, 23 Mass. 409. But where the requirement of privity cannot be abolished entirely, the principal case should be followed, because it more nearly achieves the purpose of the statute, barring the true owner for his laches.

PROPERTY — DEDICATION OF LAND TO THE PUBLIC. — The dedicator drew up a plat of certain premises, leaving a strip along a river as a place for a public wharf. *Held*, that acceptance was necessary to complete the dedication, but that public user and repair by the municipal authorities were sufficient acceptance. *Pittsburg v. Epping-Carpenter Co.*, 45 Atl. Rep. 129 (Pa.). See NOTES.

PROPERTY — FIXTURES — EMINENT DOMAIN. — A railroad company bought land subject to a mortgage in a state where the legal title remains in the mortgagor. The mortgagee having foreclosed and bid in the property, the company took proceedings to have the land condemned. *Held*, that the damages should not include the value of the track and station built by the company before the foreclosure, because these improvements were trade fixtures, and therefore personal property. *St. Louis, etc. R. R. Co. v. Nye*, 59 Pac. Rep. 1040 (Kan., Sup. Ct.).

The reason given for this decision appears erroneous. Trade fixtures may be removed by a tenant during his term, but for all other purposes they are real property, and are conveyed with the land. *Foot v. Gooch*, 96 N. C. 265. The cases cited by the court, in which similar improvements were held to be personal property, go on the very different ground that tracks, etc., built by a railroad company, claiming only an easement in the land, do not become fixtures at all, because it is not the intention to make them a permanent accession to the realty. *Justice v. Nesquehoning, etc. R. R. Co.*, 87 Pa. St. 28. But this reasoning, if supportable, obviously does not apply to the principal case, where the railroad had the fee when it made the improvements. The decision may, however, be supported on other grounds. By statute, the landowner is entitled to receive just compensation for all land condemned, but this amount should include only his actual loss at the hands of the company, without reference to the technical rules of property. Therefore it should not include the value of the improvements. *Greve v. Saint Paul, etc. R. R. Co.*, 26 Minn. 66.

PROPERTY — LANDLORD AND TENANT — SURRENDER BY OPERATION OF LAW. — A tenant from year to year agreed orally with his landlord to determine the tenancy in the middle of the ensuing term. Subsequently he refused to leave. *Held*, that the landlord may recover possession, as the tenancy from year to year was surrendered by operation of law when the oral agreement was made. *Fenner v. Blake*, [1900] 1 Q. B. D. 426.

It is settled that a lease to a tenant for a new term constitutes a surrender by operation of law, and is, therefore, not within the clause of the Statute of Frauds requiring surrenders of leasehold interests to be in writing. *Livingston v. Potts*, 16 Johns. 28; *Eysart v. Davis*, 17 Neb. 228. The ground taken in the principal case is that an agreement by the tenant to leave at a certain date necessarily creates a new lease. It

is hard to see why the facts must be interpreted in this way, and a contrary conclusion was reached in *Doe d. Hudleston v. Johnston*, McCl. & Y. 141, and *Bussell v. Gaudsberry*, 7 Q. B. 638. Moreover, the decision leads to the curious result that, though a surrender *in futuro* is void, *Doe d. Morrell v. Milward*, 3 M. & W. 328, and an oral agreement to quit without actual change of possession is invalid, *Wallis v. Hands*, [1893] 2 Ch. D. 75, such an undertaking to leave in the future is nevertheless good because its legal effect is to create a new tenancy.

PROPERTY — LEGACIES — SET-OFF. — Testatrix devised her estate to be sold and the proceeds to be divided among her children, providing that all moneys owing her at her death from any child should go toward satisfaction of that child's share. One son had occupied land of testatrix under a lease for more than twelve years without payment of the rent due. *Held*, that, though the son had acquired title to the property under the Statute of Limitations and recovery of the rent was likewise barred, twelve years' rent should be deducted from his share. *Re Jolly*, [1900] 1 Ch. D. 292.

The result of this case is in accord with the English rule which allows an executor to retain from a legacy a debt due to the testator from the legatee, even though it is barred by the Statute of Limitations. *In re Akerman*, [1891] 3 Ch. D. 212; *In re Foster's Case*, 37 N. Y. Supp. 36. This rule arose, perhaps, out of the idea which the courts of equity have entertained, that it is unconscionable to plead the Statute of Limitations. Its anomalous character is shown by the refusal to extend it to claims barred by the Statute of Frauds, though no real distinction can be made between the cases. *In re Renson*, 29 Ch. D. 358. On principle it appears that such a set-off should be allowed only where the language of the will clearly shows that the testator intended such a deduction. *Allen v. Edwards*, 136 Mass. 138. As this is not clear in the principal case, the decision seems erroneous.

PROPERTY — REVOCATION OF LICENSE — CONTRACT TO CONVEY. — The plaintiff had a parol license to cut timber on certain land, which his licensor, without notice, entered into a contract to sell to the defendant. *Held*, that the contract revoked the license, since the licensor had no longer any right to dispose of the timber. *Bruley v. Garvin*, 81 N. W. Rep. 1038 (Wis.).

This seems to be the first time that this exact point has been decided. It is well settled that such a license is terminated by an absolute conveyance of the property or by the death of the licensor. *Drake v. Wells*, 93 Mass. 141; *Blaisdell v. Portsmouth, etc. R. R. Co.*, 51 N. H. 483. But it is clear that without some notice to the licensee there is nothing which can properly be called a revocation. The true reason for these decisions is that the legal title has passed to the grantee or heir, and a license from the former owner is no excuse for a trespass on the property. In giving a contract to convey the same effect as a deed, the principal case confuses what the licensor had a right to do under his contract with what he had the legal power to do. The legal title remained in him, and, though he held it only as security, the rights of the defendant are purely equitable. Therefore a sale of the land to a purchaser without notice would unquestionably have been valid; and on the same principle, as the plaintiff in good faith acted on a license from the legal owner of the property, he should be protected.

PROPERTY — WILLS — LAPSED LEGACIES. — *Held*, that a legacy given to discharge an obligation will not lapse by the death of the legatee prior to that of the testator. *Ward v. Bush*, 45 Atl. Rep. 534 (N. J., Ch.).

To take a case out of the rule that a legacy lapses upon the death of the legatee before the testator, ordinarily the words of the will must clearly show a contrary intention. *Toplis v. Baker*, 2 Cox Ch. 118. Accordingly, where the legacy is intended as a mere bounty, even the fact that it is given to a debtor or a creditor will not of itself prevent a lapse, for a purely personal benefit cannot go to a legatee's successors without a clear gift over to them. 1 Jar. Wills, *338-340; *Elliot v. Davenport*, 2 Vern. 521. But where, as in the principal case, the testator intends, not a bounty, but the discharge of a duty which he owes to the estate of the legatee as well as to the legatee himself, the intention not to have the legacy lapse is readily implied, even though the obligation be merely moral. *Re Sowerby's Trust*, 2 K. & J. 630; *Williamson v. Naylor*, 3 Y. & C. 208.

PROPERTY — WILLS — UNDUE INFLUENCE. — The testator devised the larger portion of his property to his attorney. *Held*, that there is no presumption that this devise was procured by undue influence. *In re Murphy's Will*, 62 N. Y. Supp. 785 (Sup. Ct., App. Div., First Dept.).

The decisions on the point are conflicting, but the more numerous and better considered authorities are in accord with the principal case. *Downey v. Murphy*, 1 Dev. & B. 82; *Herster v. Herster*, 116 Pa. St. 612. *Contra*, *Morris v. Stokes*, 21 Ga. 552, 575. It

is almost universally held that a gift *inter vivos* to one's attorney is *prima facie* void. *Greenfield's Estate*, 14 Pa. St. 506. The courts, deciding contrary to the principal case, have assimilated gifts by will to those *inter vivos*. This seems indefensible, for influence which will, at the instigation of the donor, invalidate a gift *inter vivos*, will not necessarily invalidate a devise. *Wingrove v. Wingrove*, L. R. 11 P. & Div. 81; *Jennings v. McConnell*, 17 Ill. 148. The fact that the beneficiary is an attorney may well lead to the conclusion that a gift *inter vivos* was not fairly obtained. But, since it is natural that one will leave his property to those with whom his relations are confidential, this should not affect the validity of a will.

QUASI-CONTRACTS—MONEY PAID UNDER MISTAKE.—The executor of an insolvent estate paid a creditor's claim in full, both believing that the estate was solvent. *Held*, that the executor may recover the excess above the percentage which the estate was actually worth. *Tarplee v. Capp*, 56 N. E. Rep. 270 (Ind.).

There is a conflict of authority on this question. Some decisions in accord with the principal case allow the executor to recover because the payment was made under an honest mistake of fact. *Wolf v. Baird*, 123 Ill. 585; *Mansfield v. Lynch*, 59 Conn. 320. Other courts say that, though there was a mistake of fact, yet the creditor has in good faith received only the amount of his honest claim. Hence, there is nothing inequitable in his retaining it, and he should be under no quasi-contractual liability to refund. *Larson v. Hansborough*, 10 B. Mon. 147; *Carson v. McFarland*, 2 Rawle, 118. This view, it seems, is preferable on principle.

SALES—PURCHASES FOR VALUE—ANTECEDENT DEBT.—Goods that had not been delivered were sold by the consignee to the carrier, in payment of an antecedent debt. *Held*, that the consignor can still exercise his right of stoppage *in transitu*. *Wheeling, etc. Co. v. Koonts*, 56 N. E. Rep. 471 (Ohio).

Stoppage *in transitu*, being an equitable right, is cut off by the transfer of the legal title to a purchaser for value without notice. *Lickbarrow v. Mason*, 6 East, 20. The principal case goes, therefore, on the ground that one who takes chattels in payment of an antecedent debt gives no value. This view is not without support, *Hurd v. Bickford*, 85 Me. 271, but the weight of authority is *contra*. *Taylor v. Blakelock*, 32 Ch. D. 397; *Soule v. Shotwell*, 52 Miss. 236. On principle, such a transferee without notice should be protected, since there is sufficient present consideration in the actual forbearance, which is the purpose of, and which is obtained by, the transfer. *Lease v. Scott*, 2 Q. B. D. 376. The opposite result in the principal case would, therefore, have been preferable.

SALES—STOPPAGE IN TRANSITU—RESALE BY THE VENDOR.—A vendor having stopped goods *in transitu* resold them for less than the contract price and sued for the difference. *Held*, on demurrer, that the declaration was fatally defective in not alleging notice of the resale or tender of the goods and demand of payment. *Davis Sulphur-Ore Co. v. Atlanta Guano Co.*, 34 S. E. Rep. 1011 (Ga.). See NOTES.

TORTS—BLASTING—ABSOLUTE LIABILITY.—A blast fired by the defendant on his own land threw a tree some four hundred feet and killed the plaintiff's intestate. *Held*, that liability attached irrespective of negligence. *Sullivan v. Dunham*, 55 N. E. Rep. 923 (N. Y.) See NOTES, 13 HARV. LAW REV. 600.

TORTS—CONTRIBUTORY NEGLIGENCE—LOCATION OF BUILDING.—The defendant railroad company negligently set fire to a building which the plaintiff had erected some years before partly on the defendant's right of way. *Held*, that the defendant, having impliedly licensed this occupation by the plaintiff, could not now charge him with contributory negligence. *Kansas City, etc. R. R. Co. v. Chamberlain*, 60 Pac. Rep. 15 (Kan., Sup. Ct.).

According to the better opinion, the presence of inflammable material on the plaintiff's land near a railroad track does not constitute contributory negligence, since the mere proximity of the railroad cannot deprive the landowner of the right to the enjoyment of his property. *Kellogg v. Chicago, etc. Ry. Co.*, 26 Wis. 223. This reasoning, however, does not apply to a building erected on the company's right of way. Then the plaintiff's negligence would seem to be purely a question of fact, depending on the circumstances of each case; and when the danger was equally apparent to both parties, it is hard to see how a mere license from the defendant precludes the possibility that the plaintiff was negligent. The decision can, however, be supported on the ground that, since the plaintiff's negligence was an accomplished fact and the defendant had the last chance to avoid the injury, the negligence of the defendant may be regarded as the sole legal cause of the damage. *Davies v. Mann*, 10 M. & W. 546; *Flynn v. San Francisco, etc. R. R. Co.*, 40 Cal. 14.

TORTS — LIABILITY FOR FALSE STATEMENTS — NEGLIGENCE. — The plaintiff, relying on the negligent statement of the defendant, a physician, that there was no danger, aided him in dressing a sore, and thereby became infected. *Held*, that the defendant was liable for the damage caused by his negligence. *Edwards v. Lamb*, 45 Atl. Rep. 480 (N. H.). See NOTES.

TORTS — NEGLIGENCE — ASSUMPTION OF RISK. — The plaintiff, while crossing a street diagonally, fell into a negligently constructed catch-basin. *Held*, that, in departing from the way provided by the city for pedestrians, he assumed the risk of what might happen to him. *Dayton v. Taylor's Admr.*, 56 N. E. Rep. 480 (Ohio).

The phrase, assumption of risk, is used legitimately in two classes of cases. The first is where an employee assumes all natural risks of his employment. *Sweeney v. Envelope Co.*, 101 N. Y. 520. The second is where an employee, who is aware of his employer's negligence, is himself negligent in not avoiding it. *Winston v. Churchill*, 137 Mass. 243. The expression is, however, not useful except where the relation of master and servant exists, and in the principal case there is no such relation. There, the phrase means nothing more than that the plaintiff was contributorily negligent, and simply confuses the question. For whether the plaintiff has been negligent is, in a case of any doubt, to be determined by the jury. *Grand Trunk, etc. R. R. Co. v. Ives*, 144 U. S. 408. The facts in the principal case are by no means so clear as to justify the court in taking this question away from the jury, yet in effect this is done by charging that the plaintiff assumed the risk. The decision, therefore, seems erroneous. See *Davis v. Forbes*, 171 Mass. 548, 553.

TORTS — TROVER — MEASURE OF DAMAGES. — Defendant, in good faith, bought a buggy from one who had made part payment under a conditional sale which forbade his parting with possession. *Held*, that he is liable in trover to the first vendor for the value of the buggy at the time of conversion, up to the amount due under the conditional sale. *Woods v. Nichols*, 45 Atl. Rep. 548 (R. I.).

Some courts hold that, since the first seller in such cases retains title, the defendant is liable for the full value of the chattel at the time of conversion. *Angier v. Taunton Paper Co.*, 67 Mass. 621; *Brown v. Haynes*, 52 Me. 578. This view is objectionable, since it allows the owner to recover more than his actual damages, and thereby overlooks the fundamental principles of compensation upon which trover is based. Other courts allow the convertor to set up, in mitigation of the plaintiff's damages, the amount paid under the conditional sale. *Meeks v. Simon*, 2 Misc. Rep. 241. Under this rule, the plaintiff is left to his remedy on the contract for any loss which he may incur through the depreciation of the chattel before the conversion. The same objection as before arises, however, if the chattel has increased in value since the sale, for in that case the plaintiff gets more than he has really been damaged. The position taken in the principal case avoids this difficulty, is easy of application, and reaches the desirable result. It should, therefore, be followed.

TRUSTS — MAINTENANCE OF INFANT. — The testator directed in his will that the income of his estate should be applied to his son's education, and that at a future time all the income should go to the son or his mother. There being no adequate means for the son's support, and the mother consenting, *held*, that an allowance from the income will be made for the son's maintenance. *Pitts v. Rhode Island, etc. Co.*, 45 Atl. Rep. 553 (R. I.).

Under proper circumstances, income may be applied to the maintenance of an infant, in the absence of, or even in opposition to, directions in the will. *Greenwell v. Greenwell*, 5 Ves. 195; *Stretch v. Watkins*, 1 Madd. 253. This is not allowed except where the parents cannot make other suitable provision for the child. *Thompson v. Griffin*, 1 Cr. & Ph. 317. Moreover, unless the child is the only one who has any interest in the property, the consent of all interested parties must be obtained. *Ex parte Keble*, 11 Ves. 604; *Cavenaish v. Mercer*, 5 Ves. 195, n. The principal case fulfils all these requirements. Therefore, although it violates the precise terms of the will, it is supported by authority, and reaches the desirable result.

TRUSTS — TORTS OF TRUSTEE — LIABILITY OF TRUST ESTATE. — A trustee, in working a colliery for the trust estate, caused a subsidence of the plaintiff's adjoining property. *Held*, that, as the trustee was not negligent, and was therefore entitled to be indemnified, the plaintiff could obtain satisfaction of his claim against the trustee directly out of the trust estate. *Re Raybould*, [1900] 1 Ch. D. 199. See NOTES.

REVIEWS.

We are informed that Professor J. B. Thayer will publish in August a second edition of his "Cases on Evidence," which will be used in the Law School next year. It is expected to be of about the same size as the present edition, but will have considerable changes in the way of rearrangement and the selection of cases. The general scheme of the book will continue the same.

A TREATISE ON THE LAW OF WILLS. By H. C. Underhill. In two volumes. Chicago: T. H. Flood and Company. 1900. pp. cxlii, 698, xvi, 699-1501.

With the many editions issued of the works of Jarman and Theobald, Williams on Executors, Woerner on Administration, and others, the field of the present treatise seems to be well occupied. A new book upon the subject of wills must necessarily cover ground that has been thoroughly tilled by others. In view of the constant multiplication of decisions upon so broad a topic, however, a painstaking author can perform valuable service in bringing the authorities down to date, and this Mr. Underhill has accomplished.

The first of the two volumes comprising this work is devoted to a consideration of the rules of substantive law governing the execution and revocation of wills, payment and satisfaction of legacies, etc. The second volume deals chiefly with questions of construction.

The general style of the work is clear and direct, dealing briefly with each proposition considered. Valuable as are the full collections of authorities, it is to be regretted that the author has not applied himself to a fuller discussion of principles, instead of limiting himself to merely stating them. As a result, he has sometimes failed to bring out the full effect of the principles which he lays down. For example, the leading case of *Allen v. McPherson*, 1 H. L. C. 191, is cited (and apparently this is the only time it is cited), the last of a number of cases in a note at page 224, for the proposition that where only a part of a will has been affected by undue influence, probate will be decreed of the rest. It would have been as well to point out the broader scope of the decision, namely, that fraud in inducing a certain testamentary state of mind is not relievable in equity, but is ground for the court which decides upon the *factum* of the will to refuse probate. Again, some important cases have been entirely omitted. *Doe d. Gord v. Needs*, 2 M. & W. 129, admitting direct statements of testator's intention to explain an equivocation apparent upon the face of a will, does not seem to be cited anywhere, although at page 1398 the subject of "patent and latent ambiguities" is discussed. But in many other instances no such objection can be raised. For instance, the question of undue influence, where the testator and the beneficiary stand in confidential or unlawful relations to each other, is treated at length. So the construction of certain words of common occurrence — such as "heirs," "children," "issue" — is considered in a manner which exhausts the cases. The Rule in Shelley's case still claims a chapter, although, as appears on page 905, the Rule has been repealed by Stat-

ute in at least twenty-six states. On the whole, the work presents the law on the topics treated by it in a brief and simple manner well calculated to serve the use of the practitioner.

J. I. W.

CASES ON CONSTITUTIONAL LAW. By Emlin McClain. Boston: Little, Brown & Co. 1900. pp. xxxi, 1079.

The announcement in the preface that this collection of cases is based on Judge Cooley's *Principles of Constitutional Law* somewhat disarms criticism of its plan. It will serve admirably as a supplement to Judge Cooley's book and should receive a ready welcome wherever that is the basis of instruction in Constitutional Law. The two books are alike in arrangement except in unimportant particulars. Professor McClain's cases are well selected, noticeably so in the chapter devoted to the power of the executive, and include the more important recent decisions. The ungrateful but necessary task of selecting portions of the original reports for omission has been accomplished with as little decrease in their value as legal data as could be expected. The difficulty of apportioning a comparatively limited space among many topics is also creditably dealt with, though one is inclined to think that the Admiralty and Maritime jurisdiction of the United States receives undue attention, as compared, for example, with the subject of Eminent Domain. A convenient innovation is found in the table of cases, which includes cases not printed, but cited and fully stated in opinions which are printed.

Without prejudice to the care and ability of which this case book gives every evidence, it is somewhat to be regretted that Professor McClain saw fit to hamper himself with the plan he has adopted. The value of the book for general use seems to be seriously impaired by the division and subdivision to which it has been subjected. Aside from the fact that the rather severe restrictions as to space necessarily render some of the numerous sections entirely inadequate to the requirements of their titles, the arrangement of the book tends to produce a narrow and technical treatment of particular clauses of the Constitution, to which the larger aspects of the subject are likely to be sacrificed. The nature of the judicial function under our constitutions, its political aspects, and the relation of the judiciary to the other departments of government are fundamental conceptions, a grasp of which is essential to the intelligent handling of particular problems. They demand a broad and thorough treatment, and are rather more important to the student than is the accurate classification of cases under particular provisions of the Constitution. The emphasis necessary for the purposes of the average course in Constitutional Law can hardly be laid on them when the subject is carved into as many separate topics as there are clauses in the Constitution.

F. E. H.

We have also received:—

A SELECTION OF CASES AND STATUTES ON THE PRINCIPLES OF CODE PLEADING. By Charles M. Hepburn. Cincinnati: W. H. Anderson & Co. 1900. pp. 160. This is the second installment of a work which, when completed, will amount to some six hundred pages. The first part was reviewed in 13 *HARVARD LAW REVIEW*, 531. The pages now before us deal chiefly with the interpretation of the general code provision that

every action must be prosecuted in the name of the real party in interest, except in certain specified instances. The cases are well chosen, many of them illustrating not only mere questions of procedure, but also important rules of substantive law.

LEGALIZED WRONG. A Comment on the Tragedy of Jesus. By Robert Clowry Chapman. Chicago: Fleming H. Revell Company. 1899. pp. 31. This book discusses the legal aspect of the trial of Christ by the Jews. Owing to the remarkable silence of contemporary historians as to this event, the author's conclusions are not as definite as one could wish. The book is certainly both novel and interesting, but its extreme brevity detracts greatly from its value.

NOTES ON THE LAW OF TERRITORIAL EXPANSION, with especial reference to the Philippines, submitted to the Committee of the Judiciary of the Senate of the United States, March 16, 1900. By Carman F. Randolph, of the New York Bar. pp. 54.

A TREATISE ON THE LAW OF EVIDENCE. By Simon Greenleaf. In three volumes. Vols. II. and III. Sixteenth Edition, by Edward Avery Harriman. Boston: Little, Brown & Co. 1899. pp. xcvi, 638; xliii, 542. *Review will follow.*

REPORT OF THE EXECUTIVE COMMITTEE OF THE NATIONAL ASSOCIATION OF REFEREES IN BANKRUPTCY concerning proposed amendments to the Bankruptcy Act of 1898. March, 1900. Buffalo: The Matthews-Northrup Co. pp. 106.

THE CIVIL LAW IN SPAIN AND SPANISH AMERICA. By Clifford Stevens Walton. Washington: W. H. Lowdermilk & Co. 1900. pp. xix, 672. *Review will follow.*

MARTIN'S LEGAL SYNOPSES OF NEGOTIABLE INSTRUMENTS. By Alfred H. Martin, of the Buffalo Bar. 1900. pp. 15.

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SIR ALEXANDER COCKBURN.¹

THE large measure of public attention which Sir Alexander Cockburn commanded during his lifetime probably led to an undue estimate of the permanent value of his judicial services.

¹ Alexander James Cockburn was born in 1802. His father represented an old and distinguished Scotch family, and his mother, from whom he inherited some of his most noticeable traits, was a Frenchwoman. He was educated at Cambridge, and called to the bar, at the Middle Temple, in 1829. He became Queen's counsel in 1841, and in 1843 won his first distinguished triumph in his successful defence of M'Naghten, who shot Sir Robt. Peel's private secretary. In 1847 he entered Parliament, where, in 1850, he took high rank as an orator by his speech in the Don Pacifico debate. The house of Don Pacifico, a British subject residing in Athens, had been wrecked by a mob in which Greek soldiers and gendarmes were conspicuous. Compensation having been refused, the British fleet bombarded the Piræus. Cockburn defended the government's course in a speech of remarkable eloquence. In a fine peroration, he asked the house to decide by its verdict "whether, as the Roman in days of old held himself free from indignity when he could say, 'I am a Roman citizen,' so also a British subject, in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England will protect him against injustice and wrong." "Never in our time," says Mr. McCarthy in his *History of Our Own Times*, "has a reputation been more suddenly, completely, and deservedly made than Mr. Cockburn won by his brilliant display of ingenious argument and stirring words." He was promptly rewarded with the solicitor-generalship, and twelve months later became attorney general. In 1856 he succeeded Jervis as chief justice of the Common Pleas; three years later he became chief justice of the Queen's Bench, where he presided to the day of his death in 1880. He was a man of varied accomplishments,—a linguist, a musician, and a man of exceptional literary and social acquirements. His ardent temperament led him into frequent public controversies, the most prominent of which was that with Lord Penzance over the well known ecclesiastical case of *Martin v. Mackonochie*. He published an essay on

Along with gifts which readily attract popular admiration he seems to have had an eye for effect little short of dramatic, and his distinguished manner was calculated to impress the senses even when his judgment failed to satisfy the understanding. Still, even a cursory examination of his work reveals a man of singular ability. Combining in an eminent degree the logical and imaginative qualities of mind, he was not only a consummate advocate but also a distinguished judge. Possibly there have been more eminent advocates; certainly there have been more profound judges; but rarely a man who united to such an extent the attributes of each — who made so many great arguments¹ and displayed in so

Nationality, and a series of articles, on the History of the Chase and on the Letters of Junius.

¹ Three fully reported cases of general interest furnish a basis for estimating Cockburn's powers as an advocate: the trial of Daniel M'Naghten for the murder of Sir Robert Peel's private secretary, the trial of William Palmer for the murder of J. D. Cook, and the Hopwood will case.

The M'Naghten case illustrates his ability in defence. M'Naghten, while laboring under an insane delusion that Sir Robert Peel had injured him, and mistaking Drummond for Peel, shot Drummond. In the face of great difficulties Cockburn successfully put forward the defence of partial insanity. This doctrine had been expressly repudiated by Hale, and the time-honored statement of the law was that a man must be judged by his conduct taken as a whole. Cockburn was very cautious in his argument. He ostensibly pressed the familiar doctrine by skilfully chosen extracts from Erskine's defence of Hadfield; but his real claim was that the prisoner was a monomaniac, and not, at the time the act was committed, responsible for what he did. It is to be observed that in examining his medical witnesses, although he put the case as one of partial unsoundness, he took care also to elicit the opinion that the prisoner did not know right from wrong. The judges allowed the defence to pass uncriticized, but in their remarks to the jury they simply put the case upon the usual question, whether the prisoner at the time the act was committed was sensible of the difference between right and wrong. 4 St. Tr. (N. S.) 847. Cockburn's argument in this case is probably the best specimen we have of his eloquence. It is interesting to compare it with the similar argument by Erskine in defense of Hadfield.

In the Palmer case he showed his skill as a prosecutor. The case for the crown was that Palmer first practiced upon Cook with antimony and finally killed him with strychnine. The difficulty was that tetanus, the immediate cause of Cook's death, may proceed from many causes; and no strychnine was found in the body of the deceased. The points at issue were, therefore, (1) were the symptoms in Cook's case such as could only be produced by strychnine, or could they have arisen from other diseases, and especially from one of the forms of ordinary tetanus? (2) if strychnine had been given, could it not have been discovered by chemical analysis? The second question was, however, relative not so much to the guilt or innocence of the prisoner as to the ability of the chemist who made the analysis. In the marked conflict between the testimony of the various medical witnesses, the skill with which Cockburn cross-examined the witnesses for the defence — compelling them to admit that, whatever their own favorite opinion, they were unable to distinguish Cook's symptoms from those of poisoning by strychnine — was masterly. Cockburn had made the most exhaustive study of the case, even submitting himself to examination by medical experts. The result was that evidence could not be more condensed, more complete, more closely directed to the

many notable judgments such grasp of the theory and application of law.

Like Erskine and Brougham, with whom alone he shares the highest honors of forensic advocacy at the English bar, his mind was more capacious than powerful, clear rather than profound. Although his ability to deal with complicated facts — to present them in harmonious order and reason powerfully upon them — was of a very high order, his arguments fall short of the simple logical structure which characterizes Erskine's art; and his methods are in direct contrast to Brougham's energy and force. Thus, in the

very point at issue. Cockburn's closing argument is a model of propriety as well as irresistible force. The prisoner expressed, in racing parlance, the accepted view of his conviction when he said that "it was the riding that did it."

The facts in the Hopwood will case were these: Mr Hopwood, a gentleman of large property, had, during the period of decaying mental powers preceding his death, executed a will which revoked a former will and disinherited his eldest son, who had been the beneficiary therein. The case alleged by the brothers and sisters, who would take under the second will, was that Capt. Hopwood, the eldest son, had alienated his father's affections during the last years of the latter's life by his unfeeling and overbearing insistence on assuming the management of the property, when, in fact, the old gentleman was perfectly competent to retain it. Capt. Hopwood claimed that he had simply done his duty; that his father was manifestly imbecile and incapable of transacting business; that his brothers and sisters had for their own purposes misrepresented his interference to his father, had brought about a quarrel between them, and had finally procured the execution of the second will by undue influence. The case obviously turned to a large extent upon the capacity of old Mr. Hopwood, and furnished a fine opportunity for the display of Cockburn's powers. As counsel for Capt. Hopwood, he drew an eloquent picture of the unnatural conspiracy amongst Capt. Hopwood's brothers and sisters to rob him of his rights and deprive him of his father's affections — of the son who "finds himself in danger of being despoiled of that inheritance which was the object of his rightful and legitimate hopes, and this, not by any of these accidental circumstances to which, in the mutability of human things, all men are subject, but by the machinations and hostility of those at whose hands, from the ties of blood and natural affection and from the recollection of infancy and childhood passed together, he might have expected affection, or, at all events, mercy." He referred to Mr. Hopwood as "a poor old man, worn down by years, enfeebled by infirmity and disease, gradually becoming incapable of thought or reflection, or of thought that required judgment and reasoning power, having, if he had any glimmering of intelligence remaining, only enough, and that but at times, to go through the commonest matters of every day life — having, if he had any will at all, just so much as enabled him to be influenced by those around him and to be made the creature of their desires — when, I say, with such a mind, this poor gentleman was worked upon until he made a disposition which was not his, but that of those around him, . . . should I do them wrong if I applied to them the words of the satirist, who has described in graphic language the mode in which the mind of a man may be worked upon to dispose of his property to the prejudice of those who have claims upon his natural affections, when he says:

"They still recall the past offence;
Improve his heady rage with treacherous skill,
And mould his passions till they make his will."

The verdict was in Capt. Hopwood's favor.

Hopwood will case, in speaking of a conflict of testimony — a point which Brougham would have carried by assault — Cockburn said :

“They do not give the same version of that discussion. I have no doubt that each of them came here to give what he believed to be a most faithful representation. I know what a treacherous thing man’s memory is, and more especially with regard to words. The great poet describes words as winged, and so in truth they are. They are borne away upon the breath that utters them and are lost ; and when the memory tries to reproduce them the imagination mixes itself in the operation, colors them and gives them a character and complexion which is not the truth ; and yet to the mind which repeats them they assume the semblance of reality.”

In comparison with the simplicity of Erskine’s diction, Cockburn’s eloquence seems picturesque ; his high breeding, his great social gifts, his varied scholarship and numerous accomplishments imparted a peculiar flavor to his mental operations. In judgment he surpassed both Erskine and Brougham, and the acute sensibility which was his most prominent characteristic manifested itself in a range of imagination to which neither of his rivals could make any pretension. The way in which his imagination colored his conceptions may be illustrated by his statement, in defence of M’Naghten, of the fact that the law absolves the insane from responsibility :

“ There is no doubt, gentlemen, that, according to the law of England, insanity absolves a man from responsibility and from the legal consequences which would otherwise attach to the violation of the law. And in this respect, indeed, the law of England goes no further than the law of every other civilized community on the face of the earth. It goes no further than what reason strictly prescribes ; and if it be not too presumptuous to scan the judgments of a higher tribunal, it may not be too much to believe and hope that Providence, when in its inscrutable wisdom and its unfathomable councils it thinks fit to lay upon a human being the heaviest and most appalling of all calamities to which, in this world of trial and suffering, human nature can be subjected, — the deprivation of that reason, which is man’s only light and guide in the intricate and slippery paths of life, — will absolve him from his responsibility to the laws of God as well as to those of man. The law, then, takes cognizance of that disease which obscures the intellect and poisons the very sources of thought and feeling in the human being — which deprives man of reason, and converts him into the similitude of the lower animal — which bears down all the motives which usually stand as barriers around his conduct, and bring him within the operation of the Divine and the human law — leaving the unhappy sufferer to the wild impulses which his frantic

imagination engenders, and which urge him on with ungovernable fury to the commission of acts which his better reason, when yet unclouded, would have abhorred. The law, therefore, holds that a human being in such a state is exempt from legal responsibility and legal punishment ; to hold otherwise would be to violate every principle of justice and humanity."

Another passage from the same argument will serve to indicate the robust reasoning which underlies his imaginative expression. By way of introduction to his presentation of the doctrine of partial insanity, he said :

"I think it will be quite impossible for any person who brings a sound judgment to bear upon this question, when viewed with the aid of the light which science has thrown upon it, to come to the opinion that the ancient maxims which, in times gone by, have been laid down for our guidance, can be taken still to obtain in the full force of the terms in which they were laid down. It must not be forgotten that the knowledge of this disease in all its various forms is a matter of very recent growth. I feel that I may appeal to the many medical gentlemen I see around me, whether the knowledge and pathology of this disease has not within a few recent years first acquired the character of a science ? It is known to all that it is but as yesterday that the system of treatment which in past ages — to the eternal disgrace of these ages — was pursued toward those whom it had pleased Heaven to visit with the heaviest of all human afflictions, and who were therefore best entitled to the tenderest care and most watchful kindness of their Christian brethren, — it is but as yesterday, I say, that that system has been changed for another which, thank God, exists to our honor and to the comfort and better prospect of recovery of the unfortunate diseased in mind. It is but as yesterday that darkness and solitude — cut off from the rest of mankind like the lepers of old — the dismal cell, the bed of straw, the iron chain and the inhuman scourge, were the fearful lot of those who were best entitled to human pity and to human sympathy, as being the victims of the most dreadful of all mortal calamities. This state of things has passed, or is passing, fast away. But in former times when it did exist, you will not wonder that these unhappy persons were looked upon with a different eye. Thank God, at last — though but at last — humanity and wisdom have penetrated, hand in hand, into the dreary abodes of these miserable beings, and whilst the one has poured the balm of consolation into the bosoms of the afflicted, the other has held the light of science over our hitherto imperfect knowledge of this dire disaster, has ascertained its varying character, and marked its shadowy boundaries, and taught us how, in gentleness and mercy, best to minister to the relief and restoration of the sufferer. You can easily understand, gentlemen, that when it was the practice to separate these unhappy beings from the rest of mankind, and to subject them

to this cruel treatment, the person whose reason was but partially obscured would ultimately, and perhaps speedily, in most cases, be converted into a raving madman. You can easily understand, too, that when thus immured and shut up from the inspection of public inquiry, neglected, abandoned, overlooked, — all the peculiar forms and characteristics and changes of this malady were lost sight of and unknown, and kept from the knowledge of mankind at large, and therefore how difficult it was to judge correctly concerning it. Thus I am enabled to understand how it was that crude maxims and singular propositions, founded upon the hitherto partial knowledge of this disease, have been put forward and received as authority, although utterly inapplicable to many of the cases arising under the varied forms of insanity. Science is ever on the advance; and, no doubt, science of this kind, like all other, is in advance of the generality of mankind. It is a matter of science altogether; and we, who have the ordinary duties of our several stations and the business of our respective avocations to occupy our full attention, cannot be so well informed upon it as those who have scientifically pursued the study and the treatment of the disease. I think, then, we shall be fully justified in turning to the doctrines of matured science rather than to the maxims put forth in times when neither knowledge, nor philanthropy, nor philosophy, nor common justice had their full operations in discussions of this nature."

By no means the least conspicuous element of Cockburn's advocacy is the high ideal which animates it. He expressed, with characteristic eloquence, his own conception of his duty and responsibility as an advocate in a speech which he delivered at a banquet given by the English bar to the distinguished French advocate, M. Berryer. With evident reference to the statement made on the same occasion by Lord Brougham that "the first quality of an advocate is to reckon everything subordinate to the interests of his client," Cockburn said:

"Much as I admire the great abilities of M. Berryer, to my mind his crowning virtue — as it ought to be that of every advocate — is that he has throughout his career conducted his cases with untarnished honor. The arms which an advocate wields he ought to use as a warrior, not as an assassin. He ought to uphold the interests of his clients *per fas* and not *per nefas*. He ought to know how to reconcile the interests of his client with the eternal interests of truth and justice."

Such was the range of Cockburn's imagination that, had it been balanced by equal strength in reasoning faculty, his mental equipment would have been unsurpassed. But the acute sensibility which characterized his temperament was itself of no inconsiderable aid in the successful discharge of his judicial functions. The law is not merely a system of rules; nor is its administration simply

the application of these rules by rigid logical deduction. Since it is designed to serve the needs of mankind, its efficient administration requires a clear and just appreciation of the facts to which it is to be applied. The successful investigation of these facts is therefore an essential preliminary to, and a most important element of, a just determination. A learned lawyer who is wanting in imagination and knowledge of the world may not only fail to discover the facts, but may also misapprehend the bearing upon them of the rule of which he has no full and pregnant, but only a dry and technical, knowledge. Of course the measure of value of such qualities depends upon the extent to which they coexist with a logical basis in the understanding; but in the perfect coördination of these opposite qualities reside the elements of the highest judicial capacity. In Cockburn's equipment imaginative qualities certainly predominated. His mind was perhaps too quick and susceptible to admit of the tenacity of grasp essential to the highest excellence in the formal exposition of legal doctrines. Hence he was greatest in dealing with facts. At *nisi prius* he displayed his best judicial powers. There his grace of manner, his knowledge of the world, his refined and eloquent diction and his lucid and orderly intellect, combined to make him an ideal judge. His most conspicuous effort in this sphere was his charge in the memorable Tichborne case, which occupied eighteen days in delivery.¹ In this case his view of the duty of a trial judge is distinctly set forth:

"In my opinion a judge does not discharge his duty who contents himself with being a mere recipient of evidence, which he is afterwards to reproduce to the jury without pointing out the facts and inferences to which they naturally and legitimately give rise. It is the business of the judge so to adjust the scales of the balance that they shall hang evenly. But it is his duty to see that the facts as they arise are placed in the one scale or the other according as they belong to one or the other. It is his business to take care that the inferences which properly arise from the facts are submitted to the consideration of the jury, with the happy consciousness that if we go wrong there is the judgment of twelve men having experience in the every day concerns of life to set right anything in respect of which he may have erred. . . . In the conviction of the innocent, and also in the escape of the guilty, lies, as the old saying is, the condemnation of the judge."

¹ Besides the Tichborne case, he presided, among other *causes célèbres*, at the trial of the Matlock will case; the Wainright murder case, a leading case of circumstantial evidence; the convent case of Saurin *v.* Starr, an action by a Sister of Mercy against her mother superior for assault, and Reg. *v.* Gurney, a prominent case of fraud and conspiracy.

The skill with which he laid bare the actual issues in a case, and particularly the manner in which he eliminated all elements of passion and prejudice, displays the hand of a master.¹ Still, it

¹ In the case of *Saurin v. Starr*, for instance, where the sectarian features of the case had been largely utilized for declamatory purposes by counsel, Cockburn said:

"Gentlemen, I congratulate you on having arrived at the conclusion of this 'monster cause' arising out of the miserable squabbles of a convent, which might better have been disposed of, and ought to have been disposed of, by the visitatorial jurisdiction of the bishop according to the constitution of the order. But the cause is here; and however little it may interest us, no doubt it is of deep and vital importance to the parties concerned, and we must endeavor to ascertain on which side truth and justice lie. There is no doubt that in consequence of the revelations of convent life which the trial has elicited, it has acquired a factitious interest and importance which, if it had related to disputes arising in any other religious society, it never would have possessed. We must take care that neither party derives any advantage from the religious element mixed up in the case. The plaintiff has what the defendants may deem a great advantage to her and a great disadvantage to them; that they are here upon their trial before a Protestant jury; and I must warn you against allowing any religious prepossessions or prejudices to operate to the advantage of one party or to the disadvantage of the other. I believe I am addressing twelve gentlemen who belong to our great Protestant community, and as such, perhaps also as thinking men, you may think the convent life is an object of dislike and of suspicion. But no such consideration must for a single moment influence your minds. You may think that withdrawing women from the sphere for which by nature they were destined, — that of being wives and mothers, and thus forming and cementing ties on which, in the main, human happiness must rest, — that this is an attempt to obliterate human instincts, to chill human affections, or, at all events, to repress them within the narrow bounds and limits of an artificial and unnatural life, contrary to the laws of nature and the ordinances of God. You may also think that, though man's object throughout his passage here should be to look forward to eternity and prepare for it, yet that his passage to heaven lies through the world in which we are placed. Man's service to God is never well and entirely fulfilled except when he discharges those duties, domestic and social, which we are sent here to discharge; and you may think, as the solicitor-general so eloquently expressed, that the more generous emotions and finer sentiments of the human soul, and even the religious sentiment itself, must lose rather than gain by this life of monotonous observance of trivial rules — these petty and pitiful observances which we have heard described in this case. But we have nothing to do with these considerations. This is not a case in which Protestant parents complained that their daughter had been inveigled and subjected to restraint when she wished to leave it, or has been ill-treated because her better judgment revolted at the practices she has been called upon to perform; but in the present case the person who now comes forward is one whose parents had sent a third daughter to conventual life; and we are dealing with one who does not complain of having been kept in a convent, but of being turned out of a convent — of one who, in the words of our great poet, desired still to

'Endure the livery of a nun:

For aye to be in shady cloister mew'd,

To live a barren sister all her life.'

"It would be, therefore, a great error to allow the religious feeling to interfere in this case; and we ought to try it as though we were all right-minded Catholics — members of the Roman Catholic Church, accepting as common data the system which is common to both parties, that conventual system which gives unlimited power to the superior and imposes unqualified subjection upon the subordinate."

Most of the stock arguments of criminal trials were characterized by him in his charge in the Tichborne trial. With respect to reasonable doubt he said:

- must be admitted that his methods sometimes justified complaint. He was apt to form his opinion with too rapid judgment; and although he brought to the discharge of his judicial duties the very highest sense of his responsibilities, his opinions were often put forward in such a manner as to occasion the impression that the scales of justice had not been held with that absolute impartiality which is essential to the satisfactory administration of the law.¹

"You have been asked, gentlemen, to give the defendant the benefit of any doubts you may entertain. Most assuredly it is your duty to do so. It is the business of the prosecution to bring home guilt to the accused to the satisfaction of the jury. But the doubt of which the accused is entitled to the benefit must be the doubt that a rational, that a sensible man may fairly entertain, not the doubt of a vacillating mind that has not the moral courage to decide, but shelters itself in a vain and idle scepticism. . . . I should be the last man to suggest to any individual member of the jury that if he entertains conscientious, fixed convictions, although he may stand alone against his eleven fellow jurors, he should give up the profound and unalterable convictions of his own mind. . . . But then we must recollect that he has a duty to perform, and that it is this. He is bound to give the case every possible consideration before he finally determines upon the course he will pursue, and if a man finds himself differing from the rest of his fellows with whom he is associated in the great and solemn function of the administration of justice, he should start with the fair presumption that the one individual is more likely to be wrong than the eleven from whom he differs. He should bear in mind that the great purpose of trial by jury is to obtain unanimity and put an end to further litigation; he should address himself, and in all diffidence in his own judgment, to the task he has to perform, and carefully consider all the reasons and arguments which the rest of the body are able to put forward for the judgment they are ready to pronounce, and he should let no self-conceit, no notion of being superior to the rest in intelligence, no vain presumption of superiority on his part, stand in the way. . . . That is the duty which the jurymen owes to the administration of justice and the opinion of his fellows, and therefore I must protest against the attempt to encourage a single jurymen, or one or two among a body of twelve, to stand out resolutely, positively, and with fixed determination and purpose, against the judgment and opinion of the majority."

With respect to the argument that public opinion was with the accused, he said:

"There is but one course to follow in the discharge of great public duties. No man should be insensible to public opinion who has to discharge a public trust. . . . But there is a consideration far higher than that. It is the satisfaction of your own internal sense of duty, the satisfaction of your own conscience, the knowledge that you are following the promptings of that still, small voice which never, if we listen honestly to its dictates, misleads or deceives—that still, small voice whose approval upholds us even though men should condemn us, and whose approval is far more precious than the honor or applause we may derive, no matter from what source. . . . Listen to that, gentlemen, listen to that; do right, and care not for anything that may be thought or said or done without these walls. In this, the sacred temple of justice, such considerations as those to which I have referred ought to have and can have no place. You and I have only one thing to consider; that is, the duty we have to discharge before God and man according to the only manner we should desire to discharge it,—honestly, truly, and fearlessly, without regard to any consequences except the desire that this duty should be properly and entirely fulfilled."

His charge in *Reg. v. Gurney*, 11 Cox Cr. Cas. 437, is an example of the manner in which he occasionally administered advice to the public.

¹ His charge in the Tichborne case is perhaps the strongest example of this tendency. But his conduct of the trial was conspicuously patient; and whatever exception the de-

It was a remark of Lord Westbury's, characterized by his usual keenness in disparagement, that Cockburn acquired his legal knowledge by sitting on the bench with Justice Blackburn. Beyond doubt Blackburn's vigorous intellect was the ruling power in the Court of Queen's Bench throughout Cockburn's service; and it may be imagined that a natural lawyer like Blackburn, who delighted in solving legal problems, and whose enjoyment was over as soon as the difficulty was solved, would readily concede to the ready wit and fluent tongue of his chief the opportunity of expressing in graceful and epigrammatic English the results of his acumen. But with his great natural acquisitive powers and assiduous application Cockburn certainly acquired a firm grasp of the fundamental principles of the law.¹ If the scope and activity of his

defendant might have taken to the summing up of the evidence he certainly had no just cause to complain of the dignified rebuke administered to his counsel. "When witnesses are misrepresented," said Cockburn in his charge; "when evidence is misstated; when facts are perverted — and that not for the purpose of argument in the cause, but in order to lay the foundation of foul imputations and unjust accusations against parties and witnesses; when one unceasing torrent of invective and foul slander is sent forth wherewith to blacken the character of men whose reputations have been hitherto without reproach, — then it is impossible for judges to remain silent. . . . Therefore it was that we felt it to be our duty to interpose and check the torrent of undisguised and unlimited abuse in which the learned counsel for the defendant thought proper to indulge. And in what way, gentlemen, were our remonstrances met? . . . We were met by contumely and disrespect, by insult, by covert allusions to Scroggs and Jeffries, — judges of infamous repute, — as if, in days when such a spirit as theirs animated the administration of justice, the learned counsel would not have been quickly laid by the heels and put aside. We were met by suggestions that we were interfering with the liberties and privileges of the bar. . . . We know full well that the freedom of the bar is essential to the administration of justice. We know that it would be an ill day indeed for the country if the freedom of the bar were ever interfered with. . . . We did not interfere with the privileges of the bar; we interfered to check the license of unscrupulous abuse, to restrain that which, instead of being fair, legitimate argument, amounted to misstatement, misrepresentation, and slander. The bar of England — as high-minded, noble-spirited, and generous a body of men as are to be found in the world — have never claimed slander as one of their privileges or considered its restraint as an invasion of their rights."

¹ It would be a great mistake to infer that he lacked courage in his convictions. In *Dawkins v. Paulet*, 5 Q. B. 94, he dissented not only from the conclusion reached by his associates, but also from Mr. Justice Willes' ruling in 4 F. & F. 806, and from Lord Mansfield's reasoning in *Sutton v. Johnstone*. See also his vigorous dissent in *Collen v. Wright*, 8 El. & Bl. 647, from the conclusion of his associates that a party making a contract as agent in the name of a principal impliedly contracts that he has authority from his alleged principal to make the contract, and that if he has in fact no authority he is personally liable. "My view," said Cockburn, "is that this implied contract which we are called upon to establish in this case, is a thing unknown to our law; that we are dealing not with a mere mode whereby an acknowledged liability may be enforced, but, a supposed liability having turned out to be unfounded in law, we are now creating a new species of liability on a new contract, now for the first time to be implied, which, if the party now to be charged had been required expressly to give, he would probably have refused."

intelligence and the variety of his pursuits to some extent impaired the fulness and accuracy of his acquaintance with its subordinate rules, his imagination never led him, on the other hand, aside from the path of the law into a fanciful equity. He was conservative to a fault ; but his learning was his servant, not his master, and he was fully alive to the necessity of keeping rules of law in touch with the affairs of men.¹ The liberal mind which had been formed by cultivation, travel, and wide intercourse with all classes of men, he brought to bear in the performance of his judicial functions. Servile technicality found no more outspoken opponent. If his temperament led him too often in his opinions to argue rather than expound,² his keen insight and worldly knowledge frequently saved him from pitfalls into which the less worldly would have fallen.³

¹ In the course of his elaborate opinion for the Exchequer Chamber in *Goodwin v. Roberts*, 10 Ex. 337, with respect to the negotiability of foreign scrip issued by an agent in England, he said : " It [counsel's argument] is founded on the view that the law merchant thus referred to is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and, as it were, coeval with it. But as a matter of legal history this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade ratified by the decisions of courts of law, which, upon such usages having been proved before them, have adopted them as settled law, with a view to the interests of trade and the public convenience. . . . Usage adopted by the courts having been thus the origin of the whole law merchant as to negotiable securities, what is there to prevent our acting upon the principle acted upon by our predecessors and followed in the precedents they have left us ? Why is it to be said that a new usage which has sprung up under altered circumstances is to be less admissible than the usage of past times ? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment ? . . . The universality of a usage adopted between buyers and sellers is conclusive proof of its being in accordance with public convenience ; and there can be no doubt that by holding this species of security to be incapable of being transferred by delivery, and as requiring some more cumbrous method of assignment, we should materially hamper the transactions of the money market with respect to it and cause great public inconvenience." See, also, his opinion in *Frost v. Knight*, 7 Ex. 111, where the doctrine of *Hochster v. De la Tour*, 2 E. & B. 678, was applied to a contract in which performance depended on a contingency.

² *Fitzjohn v. Mackinder*, 30 L. J. C. P. 257, may be cited as an illustration. But the habit appears in most of his opinions, as, for instance, in *Banks v. Goodfellow*, 5 Q. B. 549, where, in expounding the law with reference to the right of testamentary disposition by persons whose minds are diseased, he adds, by way of argument, " It cannot be the object of the legislator to aggravate an affliction in itself so great by the deprivation of a right the value of which is so universally felt and acknowledged." On the other hand, his skill in this respect is displayed to advantage in cases turning mainly on questions of fact, like *Jackson v. Met. R. R. Co.*, 2 C. P. D. 125.

³ See his interesting opinion in *Robinson v. Robinson*, 1 Swab. & Tr. 392, a divorce case in which was sought to prove a wife's criminality by admissions in her diary.

Cockburn was at his best in the exposition of those branches of the law which are most closely based upon human life and conduct. But, as a whole, his influence upon the law has probably been felt more in the impulse and direction which he gave to certain topics than in his direct contribution to its formal contents. One important doctrine is, however, directly attributable to him — the doctrine with respect to partial insanity. Cockburn's successful defence of M'Naghten in 1843, on the ground of partial insanity, provoked much discussion.¹ Prior to that time the law had followed the prevailing medical doctrine, which, regarding insanity as a mental state resulting from disease, looked at the mind as a whole, and accordingly considered unsoundness in any one part or faculty as likely to render the entire mind unsound. The theory of partial insanity originated with a school of French physicians, some seventy years ago, and was named monomania by Esquirol, one of their number. Cockburn was thoroughly familiar with the French language and literature, and had no doubt studied the French theory, although he made no reference to it as such in his argument. He did, however, distinctly call M'Naghten a monomaniac. Upon the acquittal of M'Naghten, Lord Brougham, who was strongly opposed to the new theory, instituted an inquiry in the House of Lords, in pursuance of which the judges were called upon to answer certain questions formulated by the House, with a view to determining what the law really was. The judges showed considerable hesitation in dealing with the abstract proposition, but finally answered in such a way as to sanction the new doctrine as advocated by Cockburn.² Brougham thereupon took advantage of the occasion afforded by the testamentary case of *Waring v. Waring*³ (although this was a case of general unsoundness) to restate the old doctrine and to formulate his objections to the new.⁴ But

¹ The tenor of public opinion appears in some lines of the poet Campbell, printed in the *Times* :

"The Insane —
They're a privileged class, whom no statute controls,
And their murderous charter exists in their souls."

² The doctrine has received further development by a series of American cases, of which *Parsons v. The State*, 81 Ala. 577, is an example.

³ 6 Moo. P. C. 341.

⁴ A brief quotation will indicate Brougham's standpoint: "We must keep always in view that which the inaccuracy of ordinary language inclines us to forget, that the mind is one and indivisible, that when we speak of its different powers or faculties, as memory, imagination, consciousness, we speak metaphorically, likening the mind to the body, as if it had members or compartments, whereas, in all accuracy of speech, we mean to speak of the mind acting variously, that is, remembering, fancying, reflecting, the same mind in all the operations being the agent. We therefore cannot, in any cor-

Brougham's conclusions were soon afterwards expressly repudiated, and the doctrine of partial insanity applied by Cockburn to testamentary cases in terms which have since been accepted as established law, in the leading case of *Banks v. Goodfellow*.¹ This is beyond doubt one of Cockburn's most important judicial efforts. It appeared that the testator in this case had once been confined as a lunatic, and remained subject to delusions that he was personally molested by a man who had long been dead, and that he was pursued by evil spirits whom he believed to be visibly present. Cockburn's reasoning will sufficiently appear from the following quotation :

"We do not think it necessary to consider the position assumed in *Waring v. Waring*, that the mind is one and indivisible, or to discuss the subject as matter of metaphysical or psychological inquiry. It is not given to man to fathom the mystery of the human intelligence, or to ascertain the constitution of our sentient and intellectual being. But whatever may be its essence, every one must be conscious that the faculties and functions of the mind are various and distinct, as are the powers and functions of our physical organization. The senses, the instincts, the affections, the passions, the moral qualities, the will, perception, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of mental disease and the experience of insanity in its various forms teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more only of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed, — that while the mind may be overpowered by delusions which utterly demoralize it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions which, though the offspring of mental disease, and so far consti-

rectness of language, speak of general or partial insanity ; but we may most accurately speak of the mind exerting itself in consciousness without cloud or imperfection, but being morbid when it fancies ; and so its owner may have a diseased imagination or the imagination may not be diseased, and yet the memory may be impaired, and its owner be said to have lost his memory. In these cases we do not mean that the mind has one faculty, as consciousness, sound ; while another, as memory or imagination, is diseased ; but that the mind is sound when reflecting on its own operations, and diseased when exercising the combination termed imagining or casting the retrospect, called recollecting." Lord Penzance followed this doctrine in *Smith v. Tebbitt* ; and subsequently in *Hancock v. Peaty* he applied the same principle to matrimonial capacity. The bearing of this doctrine upon the French theory of *manie sans délire*, or "moral insanity," as it has been called, is obvious. If the mind is one and indivisible, no court or jury can determine the extent of the derangement caused by even a slight attack of insanity.

¹ 5 Q. B. 549.

tuting insanity, yet leave the individual in all other respects rational and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life. No doubt when delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound; just as the body, if any of its parts or functions is affected by local disease, may be said to be unsound, though all its other members may be healthy, and their powers or functions unimpaired. . . . It is obvious that to the due exercise of a power [*i. e.* testamentary disposition] thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition. It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing, shall be able to comprehend and appreciate the claims to which he ought to give effect, and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, — that no insane delusion shall influence his will in disposing of his property, and thus bring about a disposition of it which, if the mind had been sound, would not have been made. . . . If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will or place a person so circumstanced in a less advantageous position than others with regard to this right.”¹

On the law of libel — particularly with respect to the public press — Cockburn unquestionably made considerable impression. The meaning of the reservation in favor of privileged publications had been up to his time vaguely understood in many of its applications. In the leading case of *Wason v. Walter*,² he decided that a full and faithful report in a newspaper of proceedings in Parliament, although defamatory, is not actionable — a point upon which there had been no authority.³ He established the privilege on

¹ This is now the accepted doctrine in England. *Smee v. Smee*, 5 P. D. 84; *Boughton v. Knight*, 42 L. J. P. 25. Capacity, like responsibility, is a question of fact. Technically, however, the question is still open to the House of Lords, which is bound neither by the individual nor by the collective opinion of the judges of the High Court.

² 4 Q. B. 73.

³ In *Dawkins v. Paulet*, 5 Q. B. 94, where the majority of the court held in favor of the

its true foundation when he said that the public is privileged on the same principle as the proceedings of courts of justice, *i. e.* the advantage of publicity to the community at large outweighs any private injury that may be done.¹ He also gave a strong impulse to the now prevalent rule respecting the limits of public criticism. His general principle was perfect freedom of discussion of public men, stopping short of attacks on private character and reckless imputation of motives. In the case of *Campbell v. Spottiswood*,² he established the doctrine that when a writer in a newspaper or elsewhere, in comment on public matters, makes imputations on the character of individuals which are false and libellous, as being beyond the limits of fair criticism, it is no defence that he believed them to be true.

"It is said that it is for the interests of society that the public conduct of men should be criticised without any other limits than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honor with a view to the welfare of the country if we were to sanction attacks upon them destructive of their honor and character and made without any foundation. I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that the jury shall say that the criticism

absolute privilege of communications made by a military officer to his chief, Cockburn dissented in a strong opinion. He took the ground that it never could be the duty of an officer falsely, maliciously, and without probable cause, to libel his fellow officer; that courts of common law have jurisdiction over all wilful and unjust abuse of military authority, and that it would not in any way be destructive of military discipline to submit questions of malicious oppression to the opinion of a jury. There was no appeal in this case. In the subsequent case of *Dawkins v. Lord Rokeby*, 7 H. L. 744, in which the absolute privilege was sustained by the House of Lords, the issue turned entirely on the fact that the defendant officer had been a witness. The point is therefore still open to the highest court.

¹ "Our law of libel has in many respects only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of Parliament, on judges and other public functionaries, are now made every day which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that though injustice may often be done, and that though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties."

² 3 B. & S. 769.

was not only honest but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest."

His elaborate charge in *Hunter v. Sharpe*,¹ may be regarded as supplementary to the doctrine formulated in *Campbell v. Spottiswood*,² some expressions of which were thought to imply that public writers were without protection as to statements of motive.³

A comparison of the respective statements made by Blackburn and Cockburn, in *Campbell v. Spottiswood*, of the reason why a criticism is not privileged, will go far towards justifying the foregoing characterization of Cockburn's judicial services. His conceptions on this particular topic were cleared by the Court of Appeal in the subsequent case of *Merivale v. Carson*; ⁴ and his opinions may be searched in vain for such a technical and concise but comprehensive statement of the law of libel as that made by Lord Blackburn in *Capital & Counties Bank v. Henty*.⁵

To the law in its larger relations he made some important contributions. One of the most valuable of these is his exhaustive examination of the status of martial law in his charge to the grand jury before whom it was sought to indict Colonel Nelson and Lieutenant Brand for their participation in the court martial by whose authority, during the insurrection in Jamaica in 1865, a civilian had been executed.⁶ In *Reg. v. Keyn*,⁷ he delivered his

¹ 4 F. & F. 983.

² The tenor of this charge is that a public writer on matters of public importance is protected if, in writing honestly and with reasonable moderation, he makes, through mistaken inferences on matters of fact involved, defamatory statements the truth of which he cannot substantiate.

³ Some of his many decisions in actions for libel are *Reg. v. Calthorpe*, 27 J. P. 581; *Seymour v. Butterworth*, 3 F. & F. 372; *Morison v. Belcher*, 3 F. & F. 614; *Cox v. Feeney*, 4 F. & F. 13; *Reg. v. Labouchere*, 14 Cox Cr. Cas. 419; *Parkes v. Prescott*, 4 Ex. 169; *Spill v. Maule*, 4 Ex. 232; *Seaman v. Nethercliff*, 2 C. P. D. 53.

⁴ 20 Q. B. D. 275.

⁵ 7 A. C. 741.

⁶ In his examination of the power of the sovereign, by virtue of the prerogative of the crown, in the event of rebellion, to establish and exercise martial law within the realm of England, he cleared for all time some current notions of martial law. Of late, he said, doctrines of the most startling character had been put forward—"doctrines which, if true, would establish the position that British subjects, not ordinarily subject to military or martial law, may be brought before tribunals armed with the most arbitrary and despotic power—tribunals which are to create the law they have to administer, and to determine upon the guilt or innocence of persons brought before them, with a total disregard of all those rules and principles which are of the very essence of justice, and without which there is no security for innocence. . . . And I say that before such doctrines—doctrines so repugnant to the genius of our people, to

⁷ 2 Ex. D. 63.

most elaborate opinion. The "*Franconia*," a foreign ship on a voyage to a foreign port, while passing within three miles of the shore of England, ran into and sank a British ship, whereby a passenger was drowned; and the question at issue was whether the Central Criminal Court, which exercised the jurisdiction formerly possessed by the admiral, had jurisdiction to try the captain of the "*Franconia*" for manslaughter.¹ In *Phillips v. Eyre*,² another

the spirit of our laws and institutions, to all we have been accustomed to revere and hold sacred — are countenanced and upheld in an English court of justice, we ought to see that there is sufficient authority for the assertion that British subjects can be thus treated. For it must not be forgotten that whatever may be the charge upon which a man may be accused, though he may be a rebel, though he may be the worst traitor that ever was brought to the block, he is still a subject, and entitled, when brought to justice, to those safeguards which are of the essence of justice, which have been found by experience to be necessary to prevent the rash conclusions and hasty judgments which even men experienced in the administration of justice are at times liable to form — to prevent, what sometimes happens, innocence from being confounded with guilt on appearances which a more patient and thorough investigation would have placed in a different light — safeguards more especially required in times of excitement and passion, when the minds of men are more apt to be led astray. . . . I cannot but think that the abuse of martial law is one of the main causes through which it has acquired the character for lawlessness and irresponsible power which has been ascribed to it in modern times. But it is said that as the necessity of suppressing rebellion is what justifies the exercise of martial law, and as, to this end, the example of immediate punishment is essential, the exhibition of martial law in its most summary and terrible form is indispensable. If by this it is meant that examples are to be made without taking the necessary means to discriminate between guilt and innocence, and that in order to inspire terror, men are to be sacrificed whose guilt remains uncertain, I can only say I trust no court of justice will entertain so fearful and odious a doctrine. There are considerations more important even than the shortening the temporary duration of an insurrection. Among them are the eternal and immutable principles of justice, principles which never can be violated without lasting detriment to the true interests and well being of a civilized community."

¹ His conclusion in this case is a characteristic expression of conservatism. "In the result," he said, "looking to the fact that all pretension to sovereignty or jurisdiction over foreign ships in the narrow seas has long since been abandoned — to the uncertainty which attaches to the doctrine of the publicists as to the degree of sovereignty and jurisdiction which may be exercised on the so-called territorial sea — to the fact that the right of absolute sovereignty therein and of penal jurisdiction over the subjects of other states has never been expressly asserted or conceded among independent nations, or in practice exercised or acquiesced in, except for violation of neutrality or breach of revenue or fishery laws, which, as has been pointed out, stand upon a different footing — as well as to the fact that neither in legislating with reference to shipping, nor in respect of the criminal law, has Parliament thought proper to assume territorial sovereignty over the three mile zone, so as to enact that all offences committed upon it by foreigners in foreign ships should be within the criminal law of the country, but, on the contrary, wherever it was thought right to make the foreigner amenable to our law has done so by express and specific legislation — I cannot think that, in the absence of all precedent and of any judicial decision or authority applicable to the present purpose, we should be justified in holding an offence committed under such circumstances to be punishable by the law of England."

² 4 Q. B. 225.

case arising out of the Jamaica insurrection, he held in an able opinion that where the right of action in respect of an act otherwise wrongful is taken away, before an action has been brought in England, by a law binding where such act was committed, no action can be maintained in England.¹ On his opinion as one of the judges of the Geneva Arbitration it would be unprofitable to dwell. His zealous advocacy of English interests excited admiration in England and criticism in this country and elsewhere. Cockburn's view of his position was that he sat "not as a judge, but as in some sense the representative of Great Britain," and the elaborate opinion made public by him after the dissolution of the tribunal is marred by the defects which characterize his most unfortunate controversial efforts.²

To the discharge of his duties as Lord Chief Justice of England Sir Alexander Cockburn brought the high code of honor which characterized his career at the bar; and all those qualities which give confidence to the profession and to the public at large — manly courage and independence, honest love of justice and true regard for the public welfare — are indelibly associated with his name. Certain defects of private character may have detracted from his personal influence, but the modest expectation of pro-

¹ Among his valuable contributions to the criminal law are *Reg. v. Hicklin*, 3 Q. B. 360, as to the bearing of motive in criminal acts; *Reg. v. Charlesworth*, 9 Cox Cr. Cas. 45, and *Reg. v. Winsor*, 10 Cox Cr. Cas. 308, as to whether in criminal cases a mistrial is a bar; *Reg. v. Rowton*, 10 Cox Cr. Cas. 28, on the testimony admissible to prove good character; *Reg. v. Carden*, 14 Cox Cr. Cas. 363, as to whether mandamus will lie to compel a magistrate to receive evidence.

The following commercial cases will repay examination: *Sacramanga v. Stamp*, 5 C. P. D. 295, as to whether ship owners are liable for the loss of a cargo in a deviation for the purpose of saving life; *Nugent v. Smith*, 1 C. P. D. 423, on the liability of carriers by sea; *Twycross v. Grant*, 26 P. D. 469, a case of fraudulent prospectus; *Rouquette v. Overman*, 10 Q. B. 524, as to the bearing of the *lex loci* of performance on bills of exchange; *Bates v. Hewitt*, 2 Q. B. 595, upon the obligation to disclose material facts in contracts of insurance. It may be pointed out, in this connection, that the significance of Cockburn's important opinion in *Goodwin v. Robarts*, mentioned in a former note, lies in its reputation of Blackburn's conservative view of trade customs as expressed in *Crouch v. Credit Foncier*, 8 Q. B. 376.

See, also, his elaborate discussion of the nature and effect of foreign judgments in *Castrique v. Imrie*, 30 L. J. C. P. 177; and the celebrated ecclesiastical controversy, *Martin v. Mackonochie*, 3 Q. B. D. 730; 4 Q. B. D. 697; 6 App. Cas. 424, in which the writ of prohibition issued by Cockburn was set aside on appeal.

² In cold print he calls statements of the eminent counsel for the United States "strange misrepresentations," and "assertions without the shadow of a foundation." He says "their imaginations must have been lively whilst their consciences slept;" and he finds a portion of their argument "the worst confusion of ideas, misrepresentation of fact, and ignorance, both of law and history, which were perhaps ever crowded into the same space."

fessional fame which he once expressed has been more than realized :

"I can only hope that as the result of two and twenty years of judicial life, an ever-present and honest love of justice, assiduous industry, patience in the investigation of truth, and a fearless discharge of what I deem to be my public duty, have in some degree made up for my deficiencies, and have enabled me, while immeasurably inferior to the great men who have gone before me, to discharge the duties of my office in a manner not altogether unsatisfactory to or undeserving the confidence of the profession and the public."¹

Van Vechten Veeder.

COLORADO SPRINGS, COL.

¹ Letter to Lord Penzance.

THE FOURTEENTH AMENDMENT AND SPECIAL ASSESSMENTS ON REAL ESTATE—
NORWOOD *v.* BAKER, 172 U. S. 269.

Does the Fourteenth Amendment to the Constitution of the United States prohibit "assessments" on real estate in excess of special benefits, or by any other method than according to special benefits?

II.

THE cases decided by the Supreme Court of the United States down to the case of *Norwood v. Baker* clearly hold that the Fourteenth Amendment to the Constitution of the United States does not prohibit assessments on real estate in excess of special benefits, or by methods other than according to special benefits. In the case of *Davidson v. New Orleans*¹ (on writ of error to the Supreme Court of Louisiana), the construction of the Fourteenth Amendment on this very point came before the court. The estate of John Davidson was assessed about \$50,000 for draining certain swamp lands in the state of Louisiana. The assessment was levied in that case according to the superficial area or square feet of land within the drainage section, that is to say, each square foot in the drainage district paid as much as any other square foot. There was no inquiry in regard to benefits, and the assessment was not levied according to benefits. The rule of apportionment adopted necessarily excluded the consideration of benefits. Not only so, but in the record on which that case was heard before the Supreme Court of the United States it was stipulated, among other things, that no drainage was done on plaintiff's land; that a portion of plaintiff's land did not need draining, having already been drained, and having paid the expense thereof; and that the whole assessment on the plaintiff's land amounted to about \$50,000, of which \$45,000 was assessed against one tract worth only from one fourth to one half that amount. This stipulation appears in the printed record on file in the office of the clerk of the Supreme Court at Washington. The question was thus clearly presented to the Supreme Court of the United States whether the Fourteenth Amendment prohibited such an assess-

¹ 96 U. S. 97.

ment. If ever there was a case of an assessment being a hardship upon a person, it would certainly seem that this case of Davidson was one. The Supreme Court, however, after stating, among other things, that "there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment," said (p. 104) : —

"As contributing, to some extent, to this mode of determining *what class of cases do not fall within its provision*, we lay down the following proposition, as applicable to the case before us : —

"Whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

"It may violate some provision of the state constitution against unequal taxation ; but the federal Constitution imposes no restraints on the states in that regard."

Note the language, "tax, assessment, servitude, or other burden." No distinction is made as to "assessments." Thus the Supreme Court of the United States in the Davidson case expressly decided that that "class of cases" did not "fall within the provision" of the Fourteenth Amendment ; in other words, that "the Fourteenth Amendment was not intended to cover, and did not cover, such a case ;" that is, did not deal with the subject of the levy and apportionment of taxes. That the court meant to decide and did decide in this case of Davidson *v.* New Orleans that the Fourteenth Amendment does not require that taxes and assessments be levied according to benefits, or not in excess of benefits, is also evident from what the court says (p. 106) : —

"It is also said that part of the property of the plaintiff which was assessed is not benefited by the improvement. This is a matter of detail with which this court cannot interfere if it were clearly so ; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds."

In answer to the objection that some of Davidson's property had already been assessed for a similar improvement, the court said (p. 106) : —

"It is said that the plaintiff's property had previously been assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the state to tax or assess property twice for the same purpose, we know of no provision in the federal Constitution which forbids this, or which forbids unequal taxation by the states."

Observe the words "tax or assess," with no distinction. That the foregoing statement of the decision in *Davidson v. New Orleans* is correct, and according to the understanding of the members of the Supreme Court, is evident from what they state in regard to this case in their decisions. For example, Mr. Justice Gray, giving the opinion of the court in the case of *Spencer v. Merchant*,¹ (on writ of error to the Supreme Court of New York), says (p. 356) :—

"In *Davidson v. New Orleans*, it was held that, if the work was one which the state had the authority to do, and to pay for by assessments on the property benefited, objections that the sum raised was exorbitant, and that part of the property assessed was not benefited, presented no question under the Fourteenth Amendment to the Constitution upon which this court could review the decision of the state court (96 U. S. 100, 106)."

Observe the language of the court, "*presented no question under the Fourteenth Amendment*;" that is, the Fourteenth Amendment does not deal with questions of levy and apportionment of taxes.

So, also, Mr. Chief Justice Fuller, giving the opinion of the court in the case of *Walston v. Nevin*² (on writ of error to the Court of Appeals of Kentucky), referring to the case of *Davidson v. New Orleans*, says (p. 582) :—

"And the conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, *nor that the assessment is unequal as regards the benefits conferred*, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the federal Constitution. So the determination of the taxing district and *the manner of the apportionment* are all within the legislative power (*Spencer v. Merchant*, 125 U. S. 345; *Stanley v. Supervisors*, 121 U. S. 535, 550; *Mobile v. Kimball*, 102 U. S. 691; *Hagar v. Reclamation District No. 108*, 111 U. S. 701; *United States v. Memphis*, 97 U. S. 284; *Laramie County v. Albany County*, 92 U. S. 307). And whenever the law operates alike on

¹ 125 U. S. 345.

² 128 U. S. 578.

all persons and property similarly situated, equal protection cannot be said to be denied (*Wurts v. Hoagland*, 114 U. S. 606; *Railroad Company v. Richmond*, 96 U. S. 521, 529)."

In this case of *Walston v. Nevin*, the assessment for the original construction of the street was *apportioned upon land abutting on the street according to the number of square feet* (except some slight modifications as to corner lots not material to the case). No inquiry was made as to benefits. On the contrary, the rule of apportionment laid down in the statute, namely, apportionment by the square foot, of necessity excluded any inquiry in regard benefits, precisely as the rule laid down by the statute and ordinance in *Norwood v. Baker* of apportionment by the front foot of necessity excluded any consideration of benefits. The court distinctly held that the case was governed by the principle laid down by the court in *Davidson v. New Orleans*, and that the assessment was not rendered invalid by the Fourteenth Amendment.

In *Fallbrook Irrigation District v. Bradley*¹ (on writ of error to the United States Circuit Court for the Southern District of California), involving the validity of the irrigation statutes in California, an *ad valorem* assessment upon all the land within the irrigation district was held to be not contrary to the Fourteenth Amendment, although it was objected (p. 156) : —

"That the basis of assessment for the cost of construction is not in accordance with and in proportion to the benefits conferred by the improvement. And, finally, that land which cannot, in fact, be benefited may yet under the act be placed in one of the irrigation districts and assessed upon its value to pay the cost of construction of works which benefit others at his expense."

In the argument of this case, it was shown and urged upon the court that in the organization of these irrigation districts towns and villages were frequently included. In one instance the owner of a brick building, which was included in a district, objected that his brick building not only would not be benefited by irrigation, but on the contrary would be much injured by it. The Supreme Court, however, held that these irrigation statutes and the *ad valorem* assessment levied under them did not violate the Fourteenth Amendment. The court said (p. 170) : —

"As was said by Mr. Justice Miller in *Davidson v. New Orleans*, *supra*, where the objection was made that part of the property was not in fact benefited, 'this is a matter of detail with which this court cannot

¹ 164 U. S. 112.

interfere if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds.' To the same effect *Spencer v. Merchant*, 125 U. S. 345; *Lent v. Tillson*, 140 U. S. 316, 333. In regard to the matters thus far discussed, we see no valid objection to the act in question."

The court further says (p. 175):—

"The fourth objection and also the objection above alluded to as the final one may be discussed together, as they practically cover the same principle. It is insisted that the basis of the assessment upon the lands benefited, for the cost of the construction of the works, is not in accordance with and in proportion to the benefits conferred by the improvement, and, therefore, there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law. Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation."

The court, also, after citing *Davidson v. New Orleans*, and *Walston v. Nevin*, as showing that such assessment did not violate the Fourteenth Amendment, says (p. 178):—

"There are some states where assessments under such circumstances as here exist, and made upon an *ad valorem* basis, have been held invalid, as an infringement of some provision of the state constitution, or in violation of the act under which they were levied. Counsel have cited several such in the briefs herein filed. We do not discover, and our attention has not been called to, any case in this court where such an assessment has been held to violate any provision of the federal Constitution. If it do not, this court can grant no relief."

Having considered the scope and meaning of the words "due process of law" in section 1 of the Fourteenth Amendment as those words appear and have been used in English and American constitutional history, and having considered certain cases decided by the Supreme Court in regard to assessments down to the case of *Norwood v. Baker*, we are now prepared to resume the consideration of the questions presented and decided in that case.

The court, in *Norwood v. Baker*, lays down the following proposition (p. 279):—

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation." [Italics are the court's.]

The same thing is stated in substance at the end of the court's opinion. Obviously, this general proposition needs some qualification ; otherwise it would amount to stating that no tax for a public improvement could be levied upon the owner of private property unless a *quid pro quo* substantially equivalent was given to him. This would indeed be a revolution in tax matters. This proposition, as it is stated by the court, applies to any and every kind of tax for a "public improvement." If the proposition as stated be true, it would be necessary, in the case of *any* taxes for *any* public improvement, to have an inquiry as to the special benefits conferred upon the taxpayer and make him a compensation equivalent to the tax. This language of the court, however, was used with reference to the matter then under consideration, namely, an assessment to pay for a public street. But the court did not restrict this language to the case of such assessment. This broad, general proposition of the court clearly is not correct. Neither is it correct to argue from any such broad, general proposition to the particular case which was then under consideration by the court. As the major premise is incorrect, the conclusion cannot be logically correct. If, however, the court had restricted its proposition to the particular case under consideration, it would then have amounted merely to a statement of the conclusion which the court finally came to concerning that case, and it would still have remained for the court to support its conclusion by legal principles.

The language of the court here employed as to compensation is not applicable to an argument on the subject of taxation, but would be applicable in the case of taking property by eminent domain. The distinction between taxation and eminent domain is clear and obvious. Taxation is a requirement by the government of a payment or contribution for public purposes, while a taking of property by eminent domain is the government taking to itself the *res* or *corpus* of the property. In the one case something is paid as a contribution for public purposes. The other case of eminent domain is really the case of a compulsory sale to the government. In the case of taxation, the contribution is levied and must be paid for the reason that the government which levies it is sovereign, and the contribution is needed for public purposes, and no *quid pro quo* is required. The person who pays the tax pays it because he is the subject and because the state is the sovereign, and as a matter of constitutional law it does not lie in his mouth to say whether or not he received any *quid pro quo* or an equivalent benefit for the tax.

"The taking of property by taxation requires no other compensation than the taxpayer receives in being protected by the government to the support of which he contributes."¹

Judge Cooley, in considering some objections advanced against special assessments on constitutional principles, mentions, among other objections, the following: "That they take property, *i. e.*, money, and appropriate it to the public use without compensation." In answer to this objection he says:—

"This objection would seem to fall with the last [*i. e.*, that they take property without due process of law]. If special assessments are taxes, the compensation is conclusively presumed to be received by those who pay them. It is only on the assumption that they are laid in the exercise of the power of eminent domain that the objection could have any force whatever. But the distinction between the two cases is very clear."²

What Judge Cooley ought to have said, speaking more exactly, is that the Constitution does not require any compensation; but this is substantially the same as what he did say, namely, that "the compensation is conclusively presumed to be received by those who pay them."

The court, in *Norwood v. Baker*, says (p. 279):—

"The exaction from the owner of private property of the cost of a public *improvement* in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation."

It is not obvious what distinction, if any, is intended to be made by the court between taxes for a public "improvement" and taxes for other purposes, nor is it by any means clear that any distinction exists between them. The particular public improvement which the court had under consideration was the construction of a public street, but a little reflection will show that almost all, if not all, taxes which are levied are for public improvements. The purposes for which they are levied must certainly be public ones, and if the word "improvement" is to be applied to these purposes, it ought to be applied as much to one purpose as to another. For example, there is no reason why public schoolhouses and other public buildings, municipal water works, sewers, lighting plant, almshouses, public museums, and public parks are not as much public "improvements" as a public street, and so also all the expenses for employees and for other purposes connected with all these public improvements.

¹ Per Mr. Justice Gray in *Cole v. La Grange*, 113 U. S. 1, 8.

² Cooley on Taxation, 2d ed., p. 264.

All of these purposes are or may be public, and are all equally entitled to be called public improvements. They are, therefore, all of them equally included in the proposition laid down by the court, and there is nothing stated in the opinion of the court which would furnish a basis for any distinction among them. Hence, under its proposition, the Fourteenth Amendment prohibits the exaction from the owner of private property of the cost of any of these public improvements in substantial excess of the special benefits accruing to him. If the proposition stated by the court be correct, then the ordinary *ad valorem* taxes levied in most, if not all, the states are invalid under the Constitution of the United States. If, however, the court in its proposition uses the words "public improvement" in any narrower or more restricted sense, then it is not improbable that the court may be called upon in cases that arise from time to time to say what it means by the words "public improvement," and to give some definition or description of them in connection with the rule already laid down by the court in *Norwood v. Baker* under the Fourteenth Amendment. It would be interesting to see just how the court would distinguish one kind of public improvement from another kind under the Fourteenth Amendment, — quite as interesting as to see how the court would distinguish an assessment from a tax under the Fourteenth Amendment.

If this proposition of the court be true as to a tax for a public improvement, it would also be true as to a tax for any other object so long as that object be public, the test of whether or not the purpose is one for which a tax can be levied being not whether the purpose is what may be called a public *improvement*, but whether the purpose is a public one. The Fourteenth Amendment, if it applies to the levy and apportionment of taxes at all, certainly makes no distinction between taxes for public improvements and taxes for any other public purposes.

The case of *Norwood v. Baker* involved an assessment upon land, but if the propositions and principles stated by the court be sound it is difficult to see why they must not apply equally to taxes upon personal property. The Fourteenth Amendment uses the word "property," and makes no distinction between the different kinds of property, whether it be real estate or personal property. If the Fourteenth Amendment prohibits the levy of state taxes upon land except according to benefit, it must equally prohibit the levy of state taxes upon personal property except according to benefit.

In *Norwood v. Baker*, the court mentions several times in its opinion the fact that the entire cost of the land taken and the cost of the condemnation proceedings, as well as the cost of constructing the street, was assessed upon the land of Baker by the front foot; in other words, that the land abutting upon the street constructed was required to pay for the land and all the expense of constructing the street. This fact is given such prominence in the opinion of the court that one might reasonably infer that it was regarded either as peculiar to this case of Baker, or as furnishing one of the reasons for the decision of the court. It is also said by the court that the cost of the land for the street, which land was taken from the land owned by Baker, was "assessed back" as a part of the cost of constructing the street. There were two separate and distinct proceedings: one was the taking by eminent domain of land of Baker on which to construct the street. This land was valued and the valuation confirmed by the court and the amount paid to the owner (p. 275). Afterwards, and as a separate and distinct proceeding, the assessment was levied to pay the cost of the land, including the cost of the condemnation proceedings, and also to pay the cost of constructing the street. Now it is obvious that in the case of the construction of every street the land which is necessary therefor must be condemned, purchased, or otherwise acquired and paid for (except when it is donated, as is frequently the case), and, in addition to the purchase price of such land, it is also necessary to pay the cost of construction of the street; and where condemnation proceedings are had, the cost and expense of such condemnation proceedings for properly vesting the title in the public are a proper part of the cost of the land. These expenses were all for public purposes. Clearly, these facts were not peculiar to the case of Baker. All of these facts would have been present if the streets in the village of Norwood had all been laid out at one and the same time, and if the tax had been a general *ad valorem* tax upon all the property in the village. It would in such case have been necessary to condemn the land taken for the streets and to make payment for the same, including the cost of condemnation proceedings, and also necessary to pay the cost of constructing the streets. Then the cost of all these combined would have been assessed back upon all the property of the village. The entire land in the village would thus collectively furnish all the land for the streets and receive pay for the same; and then a tax would be levied upon all the land in the village to pay the cost of the land and of condemning the same,

and also to pay the cost of constructing the street. There is, therefore, nothing peculiar in the case of Baker as to the items making up the assessment which she was required to pay. According to the rule or proposition stated by the Supreme Court, it cannot make any difference that in such a case the tax for all these items would have been made according to the value of the land, while in Baker's case it was made according to the front foot. In neither case is there any inquiry as to benefit, nor is the tax levied according to benefit, and in each case equally it might be that some lands would be taxed in excess of the direct and special benefits.

The Supreme Court, moreover, did not proceed in *Norwood v. Baker* upon the ground that there was any fraud or abuse of power involved in the case, but proceeded upon the sole and distinct ground that the assessment in question violated the Fourteenth Amendment, because it was levied according to front foot and not according to benefit. In other words, the court decided that under the Fourteenth Amendment there was *no power* to levy any assessment by the front foot, without any regard to whether there was any fraud or abuse of power.

Furthermore, the court expressly held (p. 290) that it was enough to render the assessment invalid that it was apportioned by the front foot; and that it was not necessary to show that the amount of the assessment exceeded the special benefit to the property assessed.

Parsons v. District of Columbia, 170 U. S. 45, is distinguished by the court in *Norwood v. Baker* on the ground that in the *Parsons* case the water system for which the assessment was levied was a comprehensive "system" for the district. But it at least deserves consideration whether there is any real distinction between the cases. The water system already existed in the District of Columbia, and many miles of water mains had already been laid therein. The assessment levied upon *Parsons* was an assessment for an addition to an existing system, and this addition was made (p. 49) under an act of Congress of August 11, 1894, which prescribed that "hereafter assessments levied for laying water mains in the District of Columbia shall be at the rate of one dollar and twenty-five cents per linear front foot against all lots or land abutting upon the street, road, or alley in which a water main shall be laid." In the case of *Norwood v. Baker*, the village of Norwood had an existing system of streets, and the land of Baker was assessed by the front foot for an addition to that system. This addition was as much a part of an existing system of streets as the addition of the

water main in the Parsons case was an addition to an existing system of water works. There was as much a system of public improvements in the one case as in the other. There is nothing in the report of the decision of *Norwood v. Baker* to show that all the other streets in the village had not been laid out upon the same plan as in Baker's case, and the cost assessed upon the owners of abutting property by the front foot. But suppose that the other streets in the village of Norwood had been laid out upon a different plan, and that the taxes to pay for such streets had been apportioned upon a different basis; even then the case would not have differed from the Parsons case, for it appears that in the latter case the act of Congress of August 11, 1894, above quoted, introduced a new rule as to the apportionment of the assessment. The act of June 23, 1873 (p. 48), had provided that in order to defray the expenses of laying the water mains and the erection of fire-plugs there should be levied a special tax of one and a quarter cents per square foot on every lot or part of lot which bound in or touched on any avenue, street, or alley in which a main water-pipe might thereafter be laid and fire-plugs erected; but the new assessment held valid in *Parsons v. District of Columbia* was by the front foot. There is, therefore, no real distinction in respect of the legislation and the facts before the court between the two cases of *Norwood v. Baker* and *Parsons v. District of Columbia*.

Obviously the Fourteenth Amendment has no application in this case of *Parsons v. District of Columbia*. The court would probably hold, however, that the Fifth Amendment does apply in the District of Columbia,¹ although there may possibly be a difference of opinion on this question.² No question appears to have been made in this Parsons case as to whether or not the assessment violated either of these amendments. If there was any question made under the Fifth Amendment, then the court must either have held that that amendment did not apply, or that the words there found, which are exactly like the words now in question in the Fourteenth Amendment, did not forbid an assessment by the front foot.³ In discussing this case of *Parsons v. District of*

¹ *Callan v. Wilson*, 127 U. S. 540; *Capital Traction Company v. Hof*, 174 U. S. 1; *Bradfield v. Roberts*, 175 U. S. 291.

² See articles in the HARVARD LAW REVIEW, volume xii, as follows: P. 291, by Carman F. Randolph; p. 365, by C. C. Langdell; p. 393, by Simeon E. Baldwin; p. 464, by James B. Thayer; and article in same REVIEW, volume xiii, p. 155, by A. L. Lowell, and cases cited in these articles.

³ If the provision of the Fourteenth Amendment, "nor shall any state deprive any person of life, liberty, or property without due process of law," requires the Supreme

Columbia in *Norwood v. Baker*, the court did not mention the Fifth Amendment, or state whether it regarded that amendment as applying to the District of Columbia. The *Parsons* case was discussed by the court as if it involved merely a matter of general law, as were also several of the other cases, including the New Jersey cases, cited by the court.

A curious bit of legal logic is found in certain decisions of the Supreme Court of Indiana, which is well worth considering, even at the expense of a slight digression, as showing one result of a court's making an arbitrary distinction between a "tax" and an "assessment." The constitution of Indiana provides as follows:¹—

"No political or municipal corporation in this state shall ever become indebted, in any manner or for any purpose, to any amount, in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness, and all bonds or obligations, in excess of such amount, given by such corporations, shall be void."

This two per cent. debt limit is very small — much smaller than the usual five per cent. or ten per cent. limit prescribed by constitutions of certain other states. The legislature of Indiana in 1893 passed a certain statute, since then several times amended, which provides in substance for the construction of gravel roads in and

Court of the United States to hold, as respects state taxation, the proposition stated in *Norwood v. Baker* (p. 279), namely, "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation," then — unless United States taxes are exclusively controlled by other provisions of the Constitution — it may be difficult to see why the Fifth Amendment to the Constitution, which provides, among other things, that "no person shall be deprived of life, liberty, or property without due process of law," and which applies to the United States government in the states (whether or not it does in the territories), does not equally require the court to hold, as respects United States taxation in the states, that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation." If this proposition stated by the court be a sound interpretation of the clause in the Fourteenth Amendment, then an interesting question is presented as to how far United States taxation is governed by the same clause in the Fifth Amendment in view of all the other provisions of the Constitution on the subject of taxation. For example, are United States taxes which are exacted from owners of private property for the erection of post-office buildings, court-houses, river and harbor improvements, forts, arsenals, navy-yards, etc., etc., all subject to this rule stated by the court? If not, why not?

¹ Art. XIII. sec. 1.

through townships. This act provides, among other things, for the issue of bonds by any county to pay the cost of construction of such gravel roads. The bonds are in form the obligations of the county. The statute, however, provides that the bonds and the interest thereon shall be paid by the levy of a tax upon and according to the value of the property within the township or townships in and through which the road is constructed. The Supreme Court of Indiana has decided that bonds so issued are not county indebtedness, because the tax to pay them is an "assessment," inasmuch as it is not levied upon all the property in the county.¹ The same court also holds that these bonds are not an indebtedness of the township or townships in and through which the road is constructed, because the bonds are not issued by and in the name of the township or townships.² With these decisions in force construing the debt limitation of the Indiana constitution above quoted, gravel roads may be constructed and bonds issued therefor and *ad valorem* taxes levied on all the property in any township of the state in or through which such road is constructed without any limit, so far as this provision of the state constitution is concerned. In the view of the Supreme Court of Indiana it makes no difference that so far as the township is concerned the tax is levied *ad valorem* upon all the property in the township, precisely as the general property tax is levied in the township. Observe also that this result is reached by the Supreme Court of Indiana, although the debt limitation in the constitution above quoted is not made in any manner dependent upon the question whether the debt is to be paid by a "tax" or an "assessment." Thus the court by arbitrarily using the words "tax" and "assessment" reaches the curious result above stated. Of course this same legislation and same logic could be made to apply to other public purposes besides the construction of roads or streets, as, for example, to schools, waterworks, sewers, parks, — in fact to all public purposes.

Constitutions are supposed to deal with real things. It seems to deserve consideration whether it makes any real difference to the taxpayer in the township that the public contribution required by this Indiana gravel road act for the payment of the principal and interest of the bonds is called by the court an assessment and not a tax; and it also deserves consideration whether the debt limitation of the state constitution was not intended to protect the taxpayer in the township against the creation of a debt, to the

¹ Board *v.* Harrell, 147 Ind. 500.

² Board *v.* Reeves, 148 Ind. 467.

payment of which he must contribute, whether his contribution be called an assessment or a tax — at least when the assessment and the tax are levied upon his property in precisely the same manner and for the same amounts and for the same purposes.

The foregoing instance serves as an illustration of the mischief which may be effected by a court making an arbitrary distinction between an assessment and a tax, as respects a constitutional limitation which does not either expressly or impliedly make any such distinction. It may be interesting also to consider whether the Supreme Court of the United States would regard this Indiana gravel road tax as a tax or as an assessment, within the meaning of the principle laid down in the case of *Norwood v. Baker*. If it be regarded as an assessment, as held by the Supreme Court of Indiana, then as it was levied according to the value of the land, and no inquiry made as to actual benefit conferred upon the land, it would violate the Fourteenth Amendment, under the principle stated in *Norwood v. Baker*. Obviously, the land taxed may, and some of it must, be at considerable distance from the road constructed, and may derive little or no benefit from the road, while land near the road which is taxed on the same *ad valorem* basis may derive practically all the benefit. It might be well also to suggest on this question whether this gravel road tax is to be regarded as a tax or as an assessment under the rule laid down in *Norwood v. Baker*, that it will hardly do to say that this question, so far as the Fourteenth Amendment is concerned, is to be governed by whether this tax is levied on a part only of the land in a political subdivision, for in that event it would still be necessary to choose the political subdivision with reference to which the matter is to be determined. If the county be taken as such subdivision, one result would be obtained, namely, that this would be an assessment; but if the township be taken, the other result would be obtained, namely, that this would be a tax. Which one must be taken under the Fourteenth Amendment? As all these matters of the creation and dissolution of counties and townships are matters for the regulation of the state, and are not matters with which the Constitution of the United States is at all concerned, it is obvious that no distinction should be made under the Constitution of the United States based on the taking of one political subdivision of the state rather than another in determining whether a public imposition is a tax or an assessment. Any such decision made on such basis could obviously be circumvented by action of the state, either in its constitution, or in its statutes, or in both com-

bined. Thus, for example, suppose that it was determined that as respects the county this gravel road tax was an assessment, being levied only upon part of the property in the county. There is nothing in the Constitution of the United States to hinder the state from making the county coterminous with the boundaries of the township or townships in which the assessment or tax was levied, and then the assessment would be turned into a tax, and it would be unobjectionable under the Fourteenth Amendment.

It is not intended in this article to maintain that there is not or may not be a difference between a tax and an assessment as respects provisions in some of the state constitutions or state statutes. This article does not deal with such questions. Thus, for example, the constitution of the state of California provides¹ that all property shall be taxed in proportion to its value; and the Supreme Court of California holds that the word "tax" thus used does not include an assessment; and also holds that assessments equally with *ad valorem* property taxes are all levied under the taxing power.² It is also held by the Court of Appeals of New York that both taxes and assessments derive their authority from the taxing power.³ With these distinctions, however, the Fourteenth Amendment to the Constitution of the United States has no concern. If that amendment has anything to do with the apportionment of state taxes, it is only with the generic power of taxation, and not with any one species of taxation to the exclusion of other species. Moreover, the rule or proposition stated by the court in *Norwood v. Baker* would, as is elsewhere stated in this article, render invalid under the Fourteenth Amendment the *ad valorem* property taxes levied in the states and ordinarily called "taxes," equally with what are called "assessments," for *ad valorem* taxes are not levied according to benefit.

Observe, also, that in the views presented in this article it is not sought to urge that taxes or assessments ought not to be levied according to benefit. That is a question for the consideration of the legislative body, but it is only one of the questions which a legislative body should take into consideration when it provides for the levy and apportionment of a tax. Obviously, there are many other considerations; one of these, for example, is the ability to pay. Exemptions of property below a certain amount are based

¹ Art. XIII. sec. 1.

² *Emery v. San Francisco Gas Co.*, 28 Cal. 345, 353.

³ *People v. Brooklyn*, 4 N. Y. 419, 432. So, also, to the same effect is *Dillon on Municipal Corporations*, fourth edition, section 752.

upon the principle that persons with very small amounts of property ought not to be made to pay any tax. This principle, for example, was considered in framing the Illinois inheritance tax act, which exempted estates of decedents amounting to \$2000 or less. The Supreme Court held that this exemption did not violate the Fourteenth Amendment to the Constitution of the United States.¹ The court also held in the same case that the fact that the statute in taxing estates above \$2000 levied a tax of a larger percentage upon the larger estates did not violate the Fourteenth Amendment. Another principle is also frequently applied in determining the apportionment of a tax, namely, that property devoted to educational, charitable, or religious purposes should not be compelled to pay any tax, because of the fact that it is supposed to be for the public good that such institutions should be encouraged, by reason of the benefit they confer upon the general public. For the opposite reason, namely, that certain things should be discouraged rather than encouraged, heavy taxes are usually levied upon wines, liquors, and tobacco. These considerations and many others are proper for the legislative body to take into account in determining as to the levy and apportionment of taxes. There is no prohibition in the Constitution of the United States, especially none in the Fourteenth Amendment, against the legislative body taking all these matters into consideration. Nor is there generally to be found in the constitutions of the several states any provision restricting the legislative body to the consideration of only one of these questions that ought to affect taxation, namely, as to the benefit received by the person or property taxed. Whether it would be wise for the state constitutions to make any such restriction is a question as to which the argument is certainly not all on the side of the persons who would maintain that such restriction ought to be made. One of the many reasons why such restrictions ought not to be made is that there would be difficulty in enforcing them. A rule of *quid pro quo* enforceable by the courts as to all taxes would greatly obstruct their collection. It would upset most of our taxes. The general *ad valorem* property tax in the state, city, county, or any other subdivision of the state, could no longer be levied, but it would be necessary to have an inquiry and hearing in each instance as to benefit received by the person or property taxed. This would probably result in the government being hindered in its proper functions for want of revenue, owing to delays and contests in the courts.

¹ Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283.

Nor is there any good reason why the constitutions of the several states or of the United States should thus restrict the legislative body in respect to that mode of taxation which is sometimes termed an "assessment." As we have seen above, no such restriction could be made effective without defining what is meant by the term "assessment." Various kinds of taxes have been called assessments both in the state courts and in the United States courts. Thus, for example, in the case of *Davidson v. New Orleans*, a drainage tax, levied according to area in a single taxing district, was called an assessment. So, also, a drainage tax in *Hagar v. Reclamation District*, levied according to benefits, was called an assessment. In *Walston v. Nevin* the assessment was levied by square feet upon property abutting upon the street improved. In *Fallbrook Irrigation District v. Bradley*, an assessment for irrigation purposes was levied *ad valorem* upon all the real estate in the irrigation district, including, among other things, houses and other buildings in towns. In *Kelly v. Pittsburgh*,¹ an *ad valorem* property tax for all city purposes was levied upon agricultural lands in the outskirts of a city, most of which purposes it was claimed could not be enjoyed by the land. In *County of Mobile v. Kimball*, an *ad valorem* property tax for improving the harbor of Mobile was levied upon one county instead of being levied upon the city or upon the whole state. All these taxes, except the tax in the case of *County of Mobile v. Kimball*, and *Kelly v. Pittsburgh*, were called assessments by the Supreme Court of the United States, while in those two cases they were called taxes. It is not obvious why the constitutions of the several states where these cases arose or the Constitution of the United States ought to require that these "assessments" be levied only according to benefits, or not in excess of benefits, and at the same time permit these "taxes" in the two cases of *County of Mobile v. Kimball*, and *Kelly v. Pittsburgh*, to be levied *ad valorem* and irrespective of benefits. If, therefore, a state constitution, or the United States Constitution, attempts to provide that any particular kind of taxes such as assessments shall be levied only according to benefits, or not in excess of benefits, it is necessary to make some definition of assessment, and some line of demarcation between assessments and other taxes.

Does the Fourteenth Amendment to the Constitution of the United States cut off the state legislative bodies from levying and

¹ 104 U. S. 78.

apportioning taxes in any other mode than according to benefits, and does it provide that taxes shall not be levied in excess of benefits? It certainly does not make any such restriction as to state taxes generally. Historically and on principle and on decided cases, the Fourteenth Amendment has nothing to do with the levy and apportionment of taxes. Does it make any such restriction as to assessments? If so, it must, as we have seen, make some definition of the word "assessment" which shall distinguish that kind of tax from all others. So, also, if the court is to distinguish public "improvements" from other public purposes for which taxes are levied, some definition must be given to the word "improvement." The court, I submit, has given no such definitions; neither has it stated any principles on which such definitions could be based. Neither has it given any sufficient reason why it is and how it is that the Fourteenth Amendment makes any such restriction upon the state legislative bodies as respects assessments. On the contrary, it has held as respects many taxes which the court itself has called assessments that the Fourteenth Amendment does not make any such restriction. The only decision of the court to the contrary is, I believe, in this case of *Norwood v. Baker*, and the decision in that case cannot, I submit, be supported either on principle or by precedent.

Harry Hubbard.

195 BROADWAY, NEW YORK, January, 1900.

THE RIGHT TO LOCAL SELF-GOVERNMENT.

V.

IN *Philadelphia v. Fox*¹ we find the sweeping statement² that the city of Philadelphia is a municipal corporation, created by the government for political purposes, and is "merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government — essentially a revocable agency — having no vested right to any of its powers or franchises — the charter or act of erection being in no sense a contract with the state — and therefore fully subject to the control of the legislature, who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangement, or destroy its very existence with the mere breath of arbitrary discretion. *Sic voleo, sic jubeo*, that is all the sovereign authority need say. It will be noticed that the eminent authority delivering this opinion does not lay it down as a principle applicable to all municipal corporations. The learned judge is speaking of the city of Philadelphia only. It would require a critical examination of the constitutional history and development of Pennsylvania before one could pass judgment upon this statement. It would, however, be surprising to find it to be a correct statement of the rights and powers of a division of the state that existed before there was any state or colony.

The question arose upon the validity of an act of the legislature fixing a new board of trustees for the management of the Girard fund, and other funds given in trust for charitable uses to the city of Philadelphia. The first object of inquiry would be as to the provisions made by the donors for the appointment of trustees and of their successors. If provided for by the donors, their directions should be followed. If unprovided for by them, upon general principles, the power to appoint them would reside in the equity court. The question would then arise, has the legislature the power to appoint such trustees, in that respect taking unto itself the power of the equity court? But these questions do not seem to have arisen in the case. If the legislature had such power, it might have it and still the city of Philadelphia might

¹ 64 Penn. St. 169 (1870).

² See p. 180.

not be so completely dependent upon the will of the legislature as this decision states. If so, then the sweeping statement made of the lack of any and all powers and rights of the city of Philadelphia is *obiter dictum*.

Perkins v. Slack:¹ Under an act of the legislature in 1870 certain citizens were constituted commissioners to erect certain public buildings in Philadelphia, with power to make requisitions upon the city council for the necessary funds, the council being required to levy a special tax to raise the amount so required. In 1874 a new state constitution went into effect, limiting any debt or liability by any municipal commission to an appropriation previously made therefor by the municipal government. In 1876 the said commission made a requisition for \$1,500,000, and the city council refused to raise the amount. Upon application for mandamus to compel the city council to raise this money, it was held that notwithstanding the new constitution, the council was under obligation to raise the amount required by the commissioners, and that a provision in the new constitution providing that the legislature shall not delegate to any special commission any power to interfere with any municipal improvement is prospective only, and does not apply to special commissions existing before the adoption of this constitution.

The beneficent efforts of the framers of the new constitution to restore to municipalities, to a certain extent, the right to self-government were thus frustrated by this decision.

The dissenting opinion of Paxson, J. (p. 283), must, however, commend itself to the student of constitutional law, and will probably be approved by the bar generally as the better statement of what the law should be. Referring to the scandalous mismanagement of this irresponsible commission, freed by the law from all obligation to the municipality whose money it was squandering, he says:—

“It was known to the convention that the public buildings at Broad and Market streets had been projected upon a scale of magnificence better suited for the capitol of an empire than the municipal buildings of a debt-burdened city; and that the time might come when their further prosecution would become an oppression upon the tax-payers too grievous to be borne, unless the councils, the immediate representatives of the people, should have a power of control over the amount to be annually expended. The result has fully vindicated the wisdom of the convention.”²

¹ 86 Penn. St. 270 (1878).

² See also 1 Hare, Const. Law, 630.

The case of *Commonwealth v. Plaisted*¹ was as follows: A member of the Salvation Army, while playing on a cornet without a license, in a street parade, but without creating any actual disturbance, was arrested and fined, under the provisions of ch. 323, Statutes of 1885. Upon exceptions, the case went to the Supreme Court, and it was there held that this statute, creating a board of police for the city of Boston, to be appointed by the Governor and Council from the two principal political parties, is constitutional, and therefore the fine, under its provisions, was legally imposed. At p. 383 Morton, C. J., says:—

“It is also suggested, though not much insisted on, that the statute of 1885, ch. 323, is unconstitutional, because it takes from the city the power of self-government in matters of internal police. We find no provision of the constitution with which it conflicts, and we cannot declare an act of the Legislature invalid because it abridges the exercise of the privilege of local self-government in a particular in regard to which such privilege is not guaranteed by any provision of the constitution. . . . The powers and duties of all the towns and cities, except so far as they are specifically provided for in the constitution, are created and defined by the legislature, and we have no doubt it has the right in its discretion to change the powers and duties created by itself, and to vest such powers and duties in officers appointed by the Governor, if in its judgment the public good requires this, instead of leaving such officers to be elected by the people, or appointed by the municipal authorities. . . . The Legislature has the right to fix the qualifications of members of the board, and we see no objection to the provision that they shall be appointed from two principal political parties. It is designed to secure, in the action of the board, impartiality and freedom from political bias. It can probably be regarded only as directory to the Governor, and not as an element in the tenure of the office; in either view, it violates no provision of the constitution, and it is for the Legislature to determine whether such a qualification is wise.”

Upon examination of the record of the case in the excellent collection of Massachusetts cases in the Social Law Library in Boston, it was found that the Attorney-General in his brief, after considering the act in question, maintained that the defendant was “an itinerant musician,” and so within the restrictions of the law forbidding such a one to play on the streets of Boston without a license. Not a word was said as to the rights of towns to local self-government, nor about the questionable legality of a law requiring the members of a police board to be appointed from two political

¹ 148 Mass. 375 (1888).

parties only, nor were any authorities cited on these points. The defendant's brief, among other points, denied that the defendant was an "itinerant musician;" claimed that the rules in question were unreasonable; that they interfered with the exercise of religious rights, etc.; and, finally, that the statute in question is unconstitutional, because "it takes from the city the power of self-government in matters of internal police," . . . etc., citing no authority whatever except Cooley, Const. Lims., 577, and making no objection whatever to the appointment of the members of the board from two political parties only! The Supreme Court of Massachusetts therefore holds any statute constitutional unless it conflicts with some provision of the written constitution, ignoring the unwritten constitution. It holds also that all the powers and duties of towns and cities, unless provided for in the written constitution, are created by the legislature, a conclusion that an examination of the history of the state will not sustain. Lack of space prevents our making an examination of this history, similar to that we have made of the history of Rhode Island, but it is to be hoped that some one versed in the constitutional history and development of the powers, rights, and duties of the towns of Massachusetts will undertake this task. Only a few of its features can here be pointed out, but they are enough to show the incorrectness of this theory.

"A Gen^l Court, holden att Boston, the 19th of Octob^r, 1630"
(8 present whose names are given)

"For the establishinge of the goūm^t. It was ppounded if it were not the best course that the ffreemen should have the power of chuseing Assistants when there are to be chosen, & the Assistants from amongst themselues to chuse a Goūn^r & Deputy Goūn^r, whoe wth the Assistants should have the power of makeing lawes & chusing officers to execute the same. This was fully assented vnto by the gen^lall vote of the people, & ereccon of hands/." ¹

This was the first time the term "General Court" was used on this side of the ocean, although many of the previous meetings in England had been so entitled. It would seem that hereafter the annual meetings were so called, *i. e.*, the meetings held May 18, 1631,² May 9, 1632,³ May 29, 1633,⁴ May 14, 1634,⁵ but the next meeting of the General Court was held Sept. 3, 1624, at Newe Towne.⁶

¹ 1 Recs. of Mass., Shurtleff, *62.

⁴ Ib. *99.

² Ib. *72.

⁵ Ib. *114.

³ Ib. *88.

⁶ Ib. *122.

At the General Court holden May 14, 1634, we find for the first time, besides the governor, deputy governor, treasurer, etc., three deputies from each of the towns of Newtown, Watertown, Charlestown, Boston, Roxbury, Dorchester, Lynn, and Salem. The list is remarkable, because, according to the dates given in the Manual of the General Court of Massachusetts, Lynn was not incorporated until "Nov. — 1637." How, then, could its representatives attend a General Court in 1634? The list is also remarkable because of the towns that were not present. The absence of representatives from Plymouth, a distinct, separate colony, can be accounted for, but where were the representatives from Medford, incorporated Sept. 28, 1630, according to the Manual?

The former form of oath for the freemen was revoked and a new one was adopted (to support the government of this commonweale and all its liberties and privileges).

It was agreed that none but the General Court has power to choose and admit freemen, nor to make and establish laws, nor to elect officers named "or any of like moment," and to set out their powers, nor to raise money and taxes and to dispose of lands.

Thomas Dudley was chosen governor and Roger Ludlow deputy governor, with nine assistants for one year, and they took the oath of office. It is interesting to note that among the assistants was William Coddington, who was chosen treasurer. He was afterwards banished (under the euphonious designation of "haveing license to deþt"),¹ and became one of the founders and most prominent men of Rhode Island. His experience in establishing the government of this commonwealth was to stand him in good stead in assisting to frame a government for Newport and Rhode Island, and afterwards in surreptitiously obtaining a charter thereto in England, to himself, his heirs and assigns, to the great annoyance of the good people of Rhode Island.

It was agreed that no trial for life or banishment should be held without a jury. Provision was made that four general courts should meet yearly, the freemen of each town to choose two or three of their number to attend each general court, to make laws, to grant lands, etc., the election of magistrates and other officers only excepted, "wherein eūy freeman is to gyve his owne voyce."

A murder having taken place at Kennebec "by one of the Plymouththe plantacōn," in the presence of John Alden he gave bond with

¹ 1 Mass. Recs. #218.

sureties not to depart out of the limits of this patent without leave from the court or the governor, he being detained "till answer be received from those of Plymouth, whither they will trye the matter there or noe." Provision was made for the enlargement of "Newe Towne" and Boston, and for the annexation of Winetsemut to "Charlton" or Boston. Provision was also made for the common defence, and authority was given to the towns to levy rates on each man "according to his estate & with consideracōn of all other his abilityes."

This necessarily rapid survey is enough to show that the king did not create Massachusetts. He established a trading company which the settlers outgrew and set aside, and replaced with a commonwealth at this session of May 14, 1634. In effect this meeting was in the nature of what we should now call a constitutional convention. Up to this time there was no commonwealth, no central popular government with trial by jury established by law. After the change brought about at this meeting, every man took the oath of allegiance to Massachusetts and not to the king. It meant abrogation of the authority of the king, and to secure it Boston was fortified against him.¹ After this change the freemen created by the charter were required to obtain their freedom from Massachusetts, and henceforth only the new self-instituted commonwealth could make them freemen. John Winthrop was enfranchised May 25, 1636.²

The first town or "plantacōn" that we find authorized by the General Court is Concord: "It is ordered that there shallbe a plantacōn at Musketequid, & that there shallbe 6 myles of land square to belong to it . . . & the name of the place is changed, & hereafter to be called Concord."³ We find also that at this meeting (p. *159), "Ordered that Waymouthe shall have a deputy this court." The towns composing the combination of towns known as Massachusetts that thus authorized the formation of a new town were therefore in existence as separate original towns, before there was any Massachusetts. Therefore Massachusetts did not create them; they created Massachusetts. The Massachusetts cases have contributed largely to the erroneous theory that municipal corporations are merely the creatures of the state legislatures. Dillon, taking the cases as he found them, made the new principle familiar to bench and bar. A faint something, to be sure, was allowed to towns, but cities had no powers unless they

¹ 1 Mass. Recs. *112, 113, 114, 116, 117.

² *Ib.* *372.

³ *Ib.* *157.

were conferred by the legislature. The dogma is simple, but it is not supported by the facts of history.

The denial of corporate powers to towns in Massachusetts seems to have begun in 1816 in *Rumford v. Wood*.¹ In this case "the inhabitants of the fourth school district in the town of Rumford in the town of Oxford" brought suit against the defendant in assumpsit, for failure to build a schoolhouse, etc., as agreed. The defendant pleaded in abatement that the plaintiffs were not a corporation with power to sue. The plea was rightly overruled, and there the opinion should have stopped. But it went on, after admitting that school districts are not bodies politic and corporate with the general powers of corporations: "The same may be said of towns and other municipal societies, which, although recognized by various statutes and by immemorial usage, as persons or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained, by suits at law, are yet deficient in many of the powers incident to the general character of corporations." As the case before the court did not involve the case of a town nor of a town charter, nor of the rights of a town, this was clearly *obiter dictum*. All that the case really decided was that a school district has enough of the character of a corporation to sue. It was correctly cited as an authority to this effect in the opinion of *Prout v. Fire District* in *Pittsfield*.²

Mass. St. 1885, ch. 377, is an act to authorize the city of Boston to take land and to construct thereon a court house for the county of Suffolk, to be paid for by the city of Boston, although as the act states, this court house is "for the use of the courts of the commonwealth in and for the county of Suffolk, and for other purposes incidental thereto." This court house having been completed, in 1894 the General Court passed an act (ch. 453) placing the building in the care, custody, and control of the justices of the Supreme Judicial Court, with authority to appoint and remove, etc., the necessary custodians, whose salaries shall be paid by the city of Boston. No one seems to have called attention to the manifest impropriety and illegality of housing the Supreme Court of the state at the expense of the city of Boston, and in making the city pay the running expenses of this state court house. If the commonwealth has the legal power to saddle the cost and the running expenses of this state court house upon a city, it has equally the right to saddle it or any other expense incurred for the state

¹ 13 Mass. 193.

² 154 Mass. 450 (1891).

upon the smallest town in the state. The statute is manifestly unconstitutional. Such is the result of the denial of the right to local self-rule. The glory of Massachusetts as a union of self-governing towns is gone, never to be restored, except by a constitutional amendment or a reversal of the opinion in *Commonwealth v. Plaisted*.

Many years ago the city of Boston built and paid for its own system of water works at an expense of more than twenty-five million dollars, of which amount bonds issued for seven million one hundred and twenty six thousand, one hundred and forty dollars and nineteen cents remain unpaid. Under a statute passed by the General Court,¹ "An Act to provide for a Metropolitan Water Supply," the commonwealth took the supply but left Boston to pay the debt in a peculiar manner, provided in the act. It remains to be seen whether adequate compensation will be made for the property taken from the city. The duty of providing water for Boston and the surrounding towns and cities named in the act (sec. 3) is purely local, yet the governor is to appoint the commissioners, who are to report annually to the General Court, and the treasurer of the commonwealth pays the expenses from the proceeds of bonds authorized to be issued, to be known as the Metropolitan Water Loan. A sinking fund is provided for the ultimate payment of this loan. The cities and towns named, surrounding Boston, are to obtain the benefit of what Boston has bought and paid for, and all are expected to receive new benefits. An enormous new debt is to be created and ultimately to be paid. If the state may thus take upon itself the fulfillment of this purely local duty in this instance, so may it equally take upon itself the fulfillment of any purely local duty in any or all, even the smallest and poorest town in the state, and what has become of the principle of local self-government?

Boston, the home of Samuel Adams, who did so much through the action of the towns to make the Revolution a success, against the attempted exercise of England's power to tax us without representation, is now completely at the mercy of the General Court, and no one protests. Whatever is wanted in Boston, recourse is had to the General Court. Its committees hold long sessions every year for hearings upon laws that relate to the local government of Boston. See the article on "Massachusetts as a Philanthropic Robber," by Charles Warren,² for repeated instances of

¹ Acts of Mass. ch. 488 (1895).

² 12 HARVARD LAW REVIEW, 316.

the voting away of the money of Boston by the commonwealth's General Court. The state can afford to be generous with the city's money.

More than 750 special acts have been passed by the General Court to regulate the local affairs of the city of Boston alone. Such is the natural result of *Commonwealth v. Plaisted*.¹ Ch. 178, Acts of 1885, limits the power of Boston to incur municipal indebtedness "exclusive of the state tax and of the sum required by law to be raised on account of the city debt," to nine dollars on every one thousand dollars of its taxable property, but the power of the General Court to incur indebtedness for the city is unlimited. The "debt limit," so much discussed now in the Boston newspapers, is a contrivance to prevent the city from borrowing much itself, while it leaves the state free to borrow as much as it pleases for the city, the city being bound to pay the debt without being consulted in its creation, and being unable to limit it. The result is, that a large part of the city debt is now managed entirely at the state house, the city being called upon by warrant to pay what the state orders. Tammany could not do better than this, and Boston is no longer really under a republican form of government.

"Beginning January 1, 1887, the borrowing capacity of the city of Boston was limited to two per cent. of the average valuation of the preceding five years, less all abatements. On February 1 of the present year the actual net debt of the city, exclusive of the water debt, was \$50,897,319.02. Adding the water debt, it was \$58,333,369.16, and with the Metropolitan water debt it was nearly \$80,000,000. According to the law of 1885, covering the two per cent. limit, leaving out the water debt, the net debt of the city should be only \$20,000,000.

"It is figured that the debt is nearly eight per cent. instead of two per cent. City officials say that this increase of the city's indebtedness is because of legislative enactments authorizing the borrowing of money outside of the debt limit.

"This year's borrowing capacity of the city within the debt limit of two per cent. for the current year is \$1,525,255.40, exclusive of the loans already authorized not yet issued of \$1,800,000."

Such is the result of the denial of home rule to the city of Boston.

The People *v. Porter*:² In this case it was held that Art. 6, § 19, and other articles and amendments of the state constitution clearly recognize counties, towns, cities, and villages as the units

¹ 148 Mass. 375 (1889).

² 90 N. Y. 68 (1882).

of division of the state, and therefore ch. 415, Laws of 1881, "to establish the Niagara Police District," a new district, carved out of other territory, and not bounded by county, town, city, or village lines, with a local police court therein erected, is unconstitutional.

The disregard of the salutary principle of local self-rule by the legislature, and the reluctance of the courts of New York to uphold it (until a late day), have resulted in the most unwarranted interference in this state by its General Assembly in the local affairs of its towns. Thus the report of the Fassett Committee of the New York Senate of 1890, appointed to investigate the subject of municipal government in New York, shows that within the six years, 1884 to 1889 inclusive, the legislature passed 1284 acts relative to the thirty cities in the state. Of these 390 acts related to the city of New York only. In 1886 280 of the 681 acts passed interfered directly with the affairs of some particular county, city, town, or village, specifically named.

In 1876 the state of New York appointed commissioners "to devise a plan for the government of cities in the state of New York." Bryce¹ says:—

"The commission of which Mr. W. M. Evarts (now senator from New York) was chairman included some of the ablest men in the state, and its report, presented 6th March, 1877, may be said to have become classical."

This commission found that one of the causes of the misgovernment of American cities is the assumption by the legislature of the direct control of local affairs; and they recommended restriction of the power of the legislature to interfere by special legislation with municipal governments or the conduct of municipal affairs.

Were our courts better informed by a bar better versed in knowledge of state constitutional law, they would more often come to the rescue of a people threatened with the loss of one of their most important rights,—the right to local self-government.

The constitution of California of 1849 provided:² "The legislature shall establish a system of county and town governments, which shall be as nearly uniform as practicable throughout the state."

Yet, so little was the system understood in this state, that in 1874, in *Ex parte Wall*,³ it is stated, "The legislature of California has never established a 'system of town governments.' The word 'town' is nowhere used in the statutes in the sense in which it is

¹ 1 Am. Comm. 609.

² Art. XI. sec. 4.

³ 48 Cal. 277, at 320.

employed in the constitution. . . . No township governments have been established."

Such is the result of an attempt at the wholesale introduction of a system for those "not to the manner born." It furnishes illustration of the truth that institutions of government are the result of growth, not of manufacture:—

"The system of town governments, as it existed in New York prior to 1846, is fully explained in the eleventh chapter of the first part of the revised statutes of 1827-8. There, as in New England, the towns possessed certain of the faculties of a body corporate; could sue and be sued, hold lands, and make contracts necessary to the exercise of their corporate powers. In New York, as elsewhere, the citizens of towns chose certain town officers, and when assembled as a deliberative body (justices of the peace presiding) made 'prudential rules and regulations' with respect to local matters committed to their discretion. In some other states, this power would seem to have been vested in boards of trustees, who constituted the local parliaments."¹

The People *v.* Batchellor:² At p. 140 the court falls into approval of the doctrine then current: that municipal corporations are creatures of the legislature and subject to its will. It admits, however, that there are limits to the exercise of this power, and holds, therefore, that such a corporation cannot be compelled against its will to become a stockholder in a railroad corporation, as directed by a statute.

The ancient right of each municipality to appoint its own officers for the preservation of order and the enforcement of law has also been jealously guarded in England by a statute that but embodies what has always been the law and the custom. Ch. 76, 5 & 6 Wm. IV., 1835, entitled "An Act to provide for the Regulation of Municipal Corporations in England and Wales," provides (sec. lxxvi.) that the council for each borough shall appoint a watch committee which shall appoint constables "for preserving the Peace by Day and by Night, and preventing Robberies and other Felonies and apprehending Offenders against the Peace." This act well illustrates the pains our English cousins have been at to preserve their ancient right to local self-government. It has been reserved for us, under a system of national and state governments more democratic in form than the English system, to introduce the undemocratic and oligarchic principle that towns and cities have no rights the legislature is bound to respect.

¹ By McKinstry, J., in *Ex parte Wall*, 48 Cal. 277, at 320 (1874).

² 53 N. Y. 128 (1873).

The right to local self-government is still preserved in England, without the safeguards of a written constitution ; but too many of the courts of this country would say this right is non-existent unless it is to be found expressly stated in the written constitution. It would seem, therefore, that not even yet has the old Teutonic idea of power delegated by the people to their own representatives taken deep enough root in the political soil of the states of our Union. Of course the political machines everywhere, irrespective of party, favor the old Roman idea of power vested in the governing body, which, at the dictation of the boss, delegates power to lieutenants and prefects not accountable to the people. Unless the courts take stand against this assumption, the right to local self-government is in a fair way to be gradually lost.

"In considering state constitutions, we must not commit the mistake of supposing that because individual rights are guarded and protected by them, they must be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed." ¹

Goodnow ² well shows how "the legislature has easily confused its powers of authorization with its powers of compulsion. It has come to regulate itself local matters, and has encroached upon the domain of municipal home rule. This encroachment upon the field of local self-government has been productive of greater evil than its attempted encroachment on the domain of the rights of private individuals. For while the courts could protect individual private rights, they have been unable to protect the rights of local government of municipal corporations."

It is submitted, however, that this has been largely from mistaken ideas as to their powers in such cases.

Not a session of the legislature of any of the larger states of our Union is held but what some new measure is introduced that would interfere with local self-government in some town or city. The New York newspapers informed us of several bills introduced last winter providing for the appointment of more boards of police commissioners in several cities that had hitherto escaped this burden. The assembly of the city of New York has been considering a bill this winter providing for the appointment of a commission to revise the city charter. It was vetoed by Mayor Van Wyck for reasons that must commend themselves to every well-wisher to local self-

¹ Cooley, *Const. Lims.* 6th ed. 49.

² *Mun. Home Rule*, 54.

government, however we may otherwise differ from the mayor, his party, and their methods. In his veto message, he says : —

“ This commission is to be appointed, not by any of the officers of the city which is to be governed by the charter to be prepared, but by the governor of the state. . . . What the welfare of the city demands is not constant charter revision, but freedom from legislative interference with the administration of its affairs and the recognition of its constitutional right of self-government.”

The act was passed over the mayor's veto, was passed also by the state legislature, and under its authority the governor has appointed the commission. The people of New York do not see the impropriety of a charter for a city drawn up by a commission not appointed by its own citizens, and over which its citizens have no control, and the results of whose labors, no matter how good, are subject to the caprice of a foreign body, the state legislature. Thus, under a mock form of republican government, an oligarchical form of government is established, and the courts, our last resort, have, in many instances, helped on, by erroneous decisions, the abolition of our liberties.

It will be noticed that many of the cases cited involved the question of the validity of the appointment of police commissioners by the governor for certain cities. It will be claimed that, even admitting the right to local self-government, police officers are doing a state duty, and therefore, being state officers and not town or city officers, the state has the right to appoint them. Therefore, it is claimed, the legislature, in authorizing the governor to appoint a board of police for a city, is not interfering with the right to local self-government. To this argument there is more than one reply. It is not denied that the legislature can appoint state police. It is claimed, however, that when it does so it must pay them with state money. It has no right to appropriate town money to pay state expenses. Of course it has power to treat all towns alike, to make them the agent to collect the state tax, levying the same percentage on the tax collected in each town for the state treasury. This, however, is very different from a special levy on one city by taking all its property used for police purposes and making the city pay salaries of police commissioners appointed by the governor, over whom, and their police officers, the city has no control. This is substantially a taking of the town or city property without due process of law, and without compensation.

But, apart from this objection, there is no agreement among the authorities that police officers are state and not local officers.

The following cases hold that they are state officers : *People v. Draper*,¹ *Mayor, etc. of Baltimore v. Howard*,² *Cobb v. City of Portland*,³ *People v. Hurlbut*,⁴ *Chicago v. Wright*,⁵ *Burch v. Hardwich*,⁶ *State v. Hunter*,⁷ *Commonwealth v. Plaisted*,⁸ and lastly, *Kelley Adr. v. Cook*⁹ (a case in which this point was conceded by the plaintiff (p. 30), and no authorities are cited. It is at variance with the history of the subject in Rhode Island, as has been shown in these articles, and may yet return to plague its inventors. In view of the history to the contrary in this state, the fact that it was taken for granted without argument and without the support of authorities, it cannot be considered as entitled to weight).

The following cases hold that they are not state officers : *Speed & Worthington v. Crawford*,¹⁰ *Allor v. Wayne*¹¹ (a thoroughly well considered case, in which the brief for the relator is of great interest, and contributed materially to the decision reached), *City of Evansville v. The State*,¹² *Rathbone v. Wirth*,¹³ *State v. Moores*.¹⁴

In *Ohio v. Covington*¹⁵ it was held : "Many duties of policemen relate to matters of general concern, and have always been regulated by the general laws of the state."

In *Robertson v. Baxter*¹⁶ we find it stated : "But constables, while, from time immemorial, elected by the people, have never been regarded as agents of their locality. They are ministers of public justice, and in that capacity are state ministerial officers, with some powers strictly local and some not local. They have nothing to do with the transaction of local business, and are, in many respects, on the same footing with justices and judges, who are chosen by local electors, but who serve the state in enforcing the general laws, which are always of general concern."¹⁷

With such confusion and conflict of view among the authorities, it is impossible to rest the right of the legislature to interfere in local self-administration of police powers upon the ground that it is the exercise of a state power and not of a town power.

Provisions that eligibility to office shall depend upon membership in certain political parties, and other similar limitations, have

¹ 15 N. Y. 344, at 362 and 373 (1857).

² 55 Me. 381 (1868).

³ 69 Ill. 318, at 326 (1873).

⁴ 38 Ks. 578, at 581 (1888).

⁵ 21 R. I. part 1-29 (1898).

⁶ 43 Mich. 76 (1880).

⁷ 150 N. Y. 459 (1896).

⁸ 29 Ohio 102, at 114 (1876).

⁹ See, also, *Metropolitan Police v. Board of Auditors*, 68 Mich. 576, at 588, 589 (1888).

¹⁰ 15 Md. 376 (1859).

¹¹ 24 Mich. 42, at 81-83 (1871).

¹² 30 Gratt. (Va.) 24 (1878).

¹³ 148 Mass. 375 (1889).

¹⁴ 3 Met. (Ky.) 207, at 210 (1860).

¹⁵ 118 Ind. 426 (1888).

¹⁶ 55 Neb. 480 (1898).

¹⁷ 57 Mich. 127, at 131 (1888).

repeatedly been held to be unconstitutional, because they prescribe a test for holding office.¹

That notwithstanding a direction that the officers to be appointed shall belong to two political parties, the act is constitutional, and this direction may be disregarded, see *People v. Hurlbut*,² *State v. Seavey*³ (overruled in *State v. Moores*⁴), and *Commonwealth v. Plaisted*.⁵

This word "test" has a definite legal meaning, as exemplified in the English Test Acts, in which religious opinion was made a reason for exclusion from office. Every one would admit that no such acts would be valid in the United States. They are equally invalid if, instead of religious opinion, political opinion be made the test for eligibility to office. It would be the grant of a special privilege to a certain class of citizens.

But if these acts could be made constitutional by merely leaving out this feature, they would lose greatly in attractiveness to politicians seeking a fat job. This explains why this test is inserted in these acts. Under pretence of non-partisanship, the two principal political machines seek to exclude the possibility of appointment of any one belonging to any other party, so that they may divide the offices as a reward for party services among their own members, as the bosses may agree. If this feature is struck out, the machine is not so solicitous for the passage of these bills.

The following well considered cases, denying the power of the legislature to interfere in municipalities with their local self-government, deserve careful study: *The State v. Denny*,⁶ *City of Evansville v. The State*,⁷ *The State v. Denny*,⁸ *Rathbone v. Wirth*,⁹ *State v. Moores*.¹⁰ It will be noticed that the later cases sustain the principles sought to be brought out in these papers, and are entitled to more weight than the many cases to the contrary that are largely *obiter dicta*. They are also later in date, and, it is confidently submitted, are the better statement of the law of to-day.

No country can live that destroys local self-government. The weak spot in our system is the exaltation of state rights at the expense of town rights and local home rule. Towns are looked

¹ *Mayor v. Board of Police*, 15 Md. 376, at 484 (1859); *Atty.-Gen. v. Councilmen of Detroit*, 58 Mich. 213 (1885); *City of Evansville v. State*, 118 Ind. 426 (1888); *The State v. Denny*, *Ib.* 449; *Rathbone v. Wirth*, 150 N. Y. 459 (1896).

² 24 Mich. 44, at 93 (1871).

³ 55 Neb. 480 (1898).

⁴ 118 Ind. 382 (1888).

⁵ *Ib.* 449 (1888).

⁶ 55 Neb. 480 (1898).

⁷ 22 Neb. 454, at 466 (1887).

⁸ 148 Mass. 386 (1889).

⁹ *Ib.* 426 (1888).

¹⁰ 150 N. Y. 459 (1896).

upon by legislatures and courts ignorant of local constitutional history as being completely under the power of the legislature. The relation of states to the United States is all right ; the relation of the towns to the state is all wrong, if the views of some courts are to prevail. It is the denial of this right of local self-government that has enabled Tweed and his successors to govern cities through state legislation. Hence the numerous acts making cities pay salaries to officers appointed by the state who are under no responsibility to the cities whose affairs they manage and whose money they disburse. To remedy this, the principle should be established that the authority that pays shall appoint and control in all local matters. "The cradle of liberty" is not in our state or nation, but in our towns and cities. Here is found the primary school for the training of American citizens. The ignoring of this fundamental truth is directly responsible for nearly all our municipal ills and for the decline in American citizenship.

To help in restoring a better state of things, every new constitution should, in its bill of rights, recognize local self-government and prohibit special legislation. It should state expressly the right of the legislature to pass general laws, and the right to mould and direct the powers, duties, and obligations of towns and cities only upon application of the particular municipality affected, and even then subject to ratification by its own voters.

Already, in sixteen state constitutions, the legislature is forbidden to regulate by any special act the internal affairs of its certain municipalities. These are: California, Art. IV. sec. 25, par. 9; Colorado, Art. IV. sec. 25; Idaho, Art. III. sec. 19; Illinois, Art. IV. sec. 22; Indiana, Art. IV. sec. 22; Missouri, Art. IV. sec. 53; Montana, Art. VI. sec. 26; Nebraska, Art. III. sec. 15; New Jersey, Art. IV. sec. 20; North Dakota, Art. IV. sec. 7, par. 11; Pennsylvania, Art. III. sec. 7; South Dakota, Art. III. sec. 23, par. 4; Texas, Art. III. sec. 56; West Virginia, Art. VI. sec. 39; and Wyoming, Art. III. sec. 27.

In many states the constitution assures the right to local self-government, sometimes by providing that the legislature shall not pass any special act creating local offices or commissions to regulate local affairs, sometimes providing that the voters may elect all or certain local officers. These are: California, Art. IV. sec. 25, par. 9, and Art. XI. sec. 11; Colorado, Art. V. sec. 35; Idaho, Art. III. sec. 19, and Art. XV.-III. sec. 19; Illinois, Art. IV. sec. 22, and Art. X. secs. 6 and 8; Indiana, Art. IV. sec. 22; Art. VI. secs. 1-3; Kansas, Art. IX.; Kentucky, secs. 97-99 and

160; Maryland, Art. IV. sec. 44, and Art. VII. sec. 1; Michigan, Art. X. sec. 3, XI.-XV. sec. 14; Minnesota, Art. XI. sec. 4; Mississippi, Art. VI. secs. 170 and 171; Montana, Art. V. secs. 26 and 36; Art. XVI. secs. 4-6; Nebraska, Art. III. sec. 15, and Art. X. sec. 4; Nevada, Art. IV. secs. 20 and 26; New Jersey, Art. IV. sec. 7, par. 11; New York, Art. X. secs. 1 and 2; North Dakota, Art. II. sec. 69, par. 32; Ohio, Art. X.; Pennsylvania, Art. III. secs. 7 and 20; Art. V. sec. 11; Arts. XIV., XV. sec. 2; South Dakota, Art. IX.; Texas, Art. III. sec. 56; Virginia, Art. VI. secs. 15-20; Washington, Art. XI. sec. 5; West Virginia, Art. IX.; Wyoming, Art. III. sec. 27; Art. XII. sec. 5.

The constitutions of Missouri, California, and Washington contain provisions under which towns and cities may make and alter their own charters by conventions of their own delegates, subject of course to the constitution and general laws of the state. The experience of these three states proves the scheme to be a good one.

In 1876 the city of St. Louis framed its own charter through a convention of thirteen of its freeholders elected by its own voters, as authorized by the state constitution. This charter has been recognized generally by the authorities on city government as the best American model.¹

In *Ewing v. Oblitzelle*,² it was held that there is no constitutional objection to allowing the voters of a city to frame and adopt their own charter of government, if authorized by the state constitution to do so.

In 1889 Kansas City, Missouri, framed and adopted its own charter in the same way, the result being satisfactory.

The system having worked well in Missouri, when the constitutional convention of California met in 1879, it was proposed to incorporate it in the new constitution. The politicians opposed it, professing great fear lest San Francisco, the only city in the state containing the requisite population of 100,000, should break loose from the rest of the state and set up a free government of its own. "This is the boldest kind of an attempt at secession," said one speaker. The opposition was so great that the friends of the measure were compelled to accept an amendment that such a charter, after acceptance by the voters of the city, must be approved also by the legislature, — to be approved or rejected as a whole, however, without alteration or amendment. For years the active operation

¹ Oberholzer, *The Referendum in America*, 91.

² 85 Mo. 64 (1884).

of "the city hall gang," a potent source of corruption in San Francisco, succeeded in defeating every charter drawn under this clause of the constitution of the state. At last, however, a majority voted to approve a charter thus framed by its own convention. The system meeting with popular approval throughout the state, the constitution was amended to allow all cities of more than 10,000 inhabitants to frame their own charters. Los Angeles was the first to frame its own charter under this amendment. It was approved by its own voters and by the legislature, and is now in successful operation.

The cities of Oakland, Stockton, San Diego, and Sacramento have also framed their own charters. They have all proved successful.

The system has worked so well that in 1890, by constitutional amendment, the right was extended to any city containing over 3500 inhabitants. In 1892 another constitutional amendment provided that charters thus framed shall become the organic law of the cities adopting them and supersede all laws inconsistent therewith, thus depriving the legislature of the power to interfere with them, even by any general law.

The constitution of Washington of 1890 contains similar provisions. Those who fear this extension of the principle that the people can govern themselves should read the debates of this convention and follow the subsequent history of this clause. Seattle has a charter thus framed, and the city comptroller writes: "The plan is acknowledged to be better than depending upon the legislature."

In 1890 Tacoma also adopted a charter of its own making. The mayor writes: "The new is felt to be superior to the old method."

Oberholzer concludes his examination of this subject: "For the good of the cities themselves, and likewise for the good of the states, it is necessary that our large cities should be free cities."

The charter of San Francisco, recently adopted, framed in the same way, by a convention of its own citizens, said to be the best city charter yet framed, is now attracting the attention of students of municipal government throughout the country. The charter of the city of New York, framed through the action of the General Assembly and not of its own citizens, is already an admitted failure, and is already to be revised in the same objectionable way it was framed, while the charters of these western cities, framed by conventions of their own citizens, are admitted successes.

These illustrations show that the people themselves in these new

communities are taking steps to correct the evils resulting from the denial by legislatures and courts of the right to local self-government.

The following necessarily brief summary of the origin of some of the English settlements on the American coast is enough to show what little title the settlers derived from England, and that the governmental powers they exercised, as exigency required, were, in the main, self-instituted powers. The facts are drawn largely from Fiske's excellent books.

Early in the seventeenth century the colonization of the North American coast became part of the avowed policy of the English government. In 1606 a joint stock company was formed for the establishment of two colonies in North America. This company obtained a grant from the crown of the territory between the thirty-fourth and forty-fourth degrees of north latitude, from the Atlantic to the Pacific oceans. This was divided between the two colonies, the territory from the thirty-fourth to the thirty-eighth degree being bestowed on the South Virginia Company, having its headquarters in London. The territory from the forty-first to the forty-fifth degree was bestowed on the North Virginia Company, with headquarters in Plymouth, Devonshire. (The name of Virginia was then loosely applied to the whole Atlantic coast north of Florida.) The intervening territory between the thirty-eighth and forty-first degrees of north latitude was to go to whichever company should first plant a self-supporting colony. The local government of each colony was to be intrusted to a council resident in America, while general supervision was to be exercised by a council resident in England, the king to appoint the council.

Under this scheme the settlement of Jamestown, Virginia, was begun in 1607. An attempt was made the same year by the North Virginia or Plymouth Company to make a settlement at the mouth of the Kennebec River, under the lead of George Popham, a kinsman of Sir John Popham, the chief justice of England. It was a failure, through ignorance of the climate, and this spread the opinion in England that North Virginia was uninhabitable on account of the extreme cold.

That adventurous spirit, John Smith, who had taken a leading part in establishing the settlement at Jamestown, came over with two ships in 1614, explored the coast from the Penobscot River to Cape Cod, and rechristened it New England. The map he made, with the names he placed on it, at the suggestion of Prince Charles, shows the importance of his explorations. The names of Cape

Elizabeth, Cape Ann, Charles River, and Plymouth still remain where Smith placed them. The name of North Virginia disappeared, and that of New England has happily taken its place.

In 1620 Sir Ferdinando Gorges obtained a new charter of King James for the Plymouth Company, making it independent of the London or South Virginia, or, as it became known, the Virginia Company. It included all land between the fortieth and forty-eighth degrees of north latitude, to forty patentees, to be known as the Council for New England. Shakespeare's friend, the Earl of Southampton, was a member. It was under this patent that all subsequent grants of land were made, regardless of other grants and of the actual occupation by Holland and France. Such was the reckless habit of the times. It was from this company the Merchant Adventurers, associated with the Mayflower Pilgrims, obtained their new patent in 1621, but without any intention of landing at what afterwards became New Plymouth. Their landing where they did, being accidental, was made without the knowledge of the patentees in England.

In 1622 the Council of the Plymouth Company granted to Sir Ferdinando Gorges and Captain John Mason, two of their own number, all the lands between the Merrimac and the Sagadahoc rivers,¹ but this grant was never executed. In 1629 Mason procured a new patent from the Plymouth Council. It included land that John Wheelwright and his associates had already settled upon and bought of the Indians (Exeter). Belknap, in his *History of New Hampshire* (p. 8), cannot account for this grant, as it included land already included in the supposed grant of 1622. The failure to execute that grant explains why a new grant was made. They obtained a further grant in 1631, and in 1634 they divided what they supposed was their property, Mason taking his share on the western side of the Piscataqua (now New Hampshire), and Gorges taking his on the eastern side (now Maine).

Settlements having been made in New Hampshire after the grant to Gorges and Mason in 1622 that was never executed, and before the grant to them in 1629, the settlers refused to admit any title except their own that they had derived from the Indians. The four original settlements or towns of New Hampshire, — Exeter, Dover, Portsmouth, and Hampton, — out of which many other towns were subsequently carved, all with the same rights and powers these original towns enjoyed, were thus colonies or

¹ 1 Haz. Col. 103, 118.

towns with self-originating compacts of government like the towns in Rhode Island. The first chapter of the History of Exeter, by Charles H. Bell, is entitled "Exeter as an Independent Republic," which is suggestive. He says that this town was the third settled in New Hampshire, the first one being at Strawberry Bank, afterwards Portsmouth, the second one being at Dover. Hampton was the last one settled. If it be claimed that all this land was included in the king's grant to the Plymouth Council, the answer is that the old Virginia Company in England complained to Parliament of the grant to the Plymouth Council as a monopoly, and in 1635 the Plymouth Council resigned their charter in consequence of this opposition, and also because of the loss of favor of these Puritan colonies with the High Church party. This left all these settlers in New Hampshire and Maine without title to the land from any English authority, and without authority to act as a government, except by agreement among themselves. The state, therefore, did not create or form these towns; they formed themselves. Accordingly, in 1639, the settlers in Exeter agreed upon association for governmental purposes. Their agreement was drawn up by their minister and leader, John Wheelwright, a brother-in-law of the celebrated Mrs. Anne Hutchinson. It was as follows:

"Whereas it has pleased the lord to move the heart of our Dread Sovereigne Charles, by the grace of god King of England, Scotland, France & Ireland, to grant licence & liberty to sundry of his subjects to plant themselves in the Westernne partes of America: Wee his loyall subjects, brethren of the church of Exceter, situate & lying upon the river of Piscataquacke wth other inhabitants there considering wth our selves the holy will of god and our owne necessity that we should not live wthout wholsome lawes & civil government amongst us, of w^h we are altogether destitute, doe in the name of Christ & in the sight of god combine ourselves together to erect and set up amongst us such government as shall be to our best discerning, agreeable to the will of god, professing ourselves subjects to our Sovereigne Lord King Charles according to the libertys of our English Colony of the Massachusets & binding ourselves solemneley by the grace & helpe of Christ & in his name & feare to submit our selves to such godly & christian laws as are established in the Realme of England to our best knowledge, & to all other lawes w^h shall upon good grounds be made & inacted amongst us. according to god y^t we may live quietly & peaceably together in all godlyness and honesty—

"Mon— 5th, d. 4th 1639"

This was called "The Combination." In the Bicentennial Address of Hon. Jeremiah Smith in 1838 he said: "It is the only

act of incorporation our town has ever had. We are a self-created body politic."

This combination was reenacted in 1640 with an explanatory preamble ; p. 18 Bell says :—

"The executive and judicial functions were vested in a board of three magistrates or elders, of whom the chief was styled Ruler. They were chosen by the whole body of the freemen, who were the electors and legislators, their enactments, however, requiring the approval of the Ruler. An inhabitant had to be admitted a freeman before he could enjoy the privileges of an elector ; and there is one instance of a freeman being deprived of his privileges as such, by reason of misconduct."

Bell goes on to say that the people of Dover and Portsmouth, having no power of government delegated to them by the crown, but finding it necessary to have some form, combined themselves each into a body politic after the example of their neighbors at Exeter. In 1640 the freemen of Dover agreed to submit themselves to the laws of England, and to such others as should be enacted by a majority of their number, until the royal pleasure should be known. There were thus four separate governments in existence, all founded on their own voluntary agreements. They joined in granting jurisdiction to Massachusetts in 1641 upon condition they should have the same liberties the people had in Massachusetts, and should have their own court of justice. Massachusetts accepted these terms, agreeing they should be exempt from all public charge except what should arise among themselves or for their own peculiar benefit ; that is to say, they were still to be allowed to assess, collect, and disburse their own taxes, and were not to pay any tax to Massachusetts. In 1642 their deputies were exempted from a test of church membership, due presumably to the fact that so many of them were of the church of England. April 8, 1644, the freemen of Exeter chose three of their number "to make town rates, to distrain for all town debts ; to pay the town's debts out of the town's treasury, or to make rates for it ; to look to the execution of all town orders ; to grant and lay out lots, provided they be not above twenty acres ; to receive into the town as inhabitants, or to keep out, such as they in their wisdom think meet."

There always had been a party disaffected to the union with Massachusetts. Supported by royal commissioners from England sent to examine and report upon colonial matters, a petition was sent to England complaining of the usurpation of Massachusetts,

and praying to be released from their tyranny. The heirs of Mason continued also to assert their title. In 1677 the matter was referred to the lords chief justices of the King's Bench and Common Pleas, who reported to the king that they could give no opinion as to the right of soil in the provinces of New Hampshire and Maine, not having the proper parties before them, it appearing that not the Massachusetts colony, but the terre-tenants, had the right of soil, and yet were not summoned to defend their titles. As to Mason's right of government within the soil he claimed, their lordships, and indeed his own counsel, agreed he had none, the great council of Plymouth under whom he claimed having no power to transfer government to any. It was determined that the four towns of Portsmouth, Dover, Exeter, and Hampton were out of the bounds of Massachusetts.¹ This report was accepted and confirmed by the king in council in 1677. Here is judicial determination that these four towns that afterwards became New Hampshire were settled independently, were governed under self-instituted powers only (and under a title to the soil derived from the Indians). Evidently New Hampshire did not make them; by their subsequent union they made New Hampshire.

The attorney-general admitted that Mason's title could be tried only where he claimed his land was. To try his title it became necessary to establish a new jurisdiction. The colony of Massachusetts was therefore informed of the king's intention to separate New Hampshire from Massachusetts, revoking all commissions Massachusetts had granted there. In 1679 a commission passed the great seal for the government of New Hampshire, inhibiting the jurisdiction hitherto exercised by Massachusetts over the towns of Portsmouth, Dover, Exeter, and Hampton, and all other lands extending from three miles to the north of the river Merrimac to the province of Maine, constituting a president and council to govern the province. These, and three of the inhabitants to be by them elected, were to constitute a court of record, with a right of appeal to the king in council. Liberty of conscience was granted to all Protestants and a local assembly.

This necessarily brief account is enough to show the fallacy of the position taken by so many courts that towns are the creatures of the legislature and subject to their will. Here we find another state in which this theory will not hold with the facts.

Amasa M. Eaton.

¹ Belknap, *Hist. of N. H.* 87; 1 Hutch. 317.

"LAW AND LOGIC."

THE ingenious writer of a leading article under this title, in the last number of the REVIEW (p. 39), seems to find in a book which he does me the honor to criticise, these three things :

1. An opinion, to use his own language, that "the law of evidence begins only when the courts, either unconsciously or purposely, violate the rules of logic concerning the relevancy of evidence;" — as against which opinion he himself declares that "logic furnishes no test of relevancy," adding that, "unless we permit the law to decide that question for us, it is not going to be decided at all."

2. That a decision in *Grand Trunk Railway v. Richardson*, 91 U. S. 469, is "banished from the domain of law," "because the court has excluded evidence which the author considers logically irrelevant."

3. A statement that a certain proposition, decided by the whole Supreme Court, in *Richmond R. Co. v. Tobacco Co.*, 169 U. S. 311, is accounted for by the fact that the judge who wrote the opinion had his legal training in Louisiana.

The writer then adds certain views as to the nature of the common law and the operation of judicial precedents in our system.

Into these last matters I will not enter. But as to the others, I should like to say a word or two. I will take them in reverse order.

1. As to the *Tobacco Company* case, the remark criticised was that "perhaps *this exposition* may be accounted for," etc. The allusion was not to the point adjudged, — relating to a very troublesome question in constitutional law, which was rightly disposed of, as I should think, — but only to the way this result was reached. In different parts of this opinion, a statute of Virginia, which was attacked as an unconstitutional regulation of interstate commerce, is explained as merely establishing "a rule of evidence," and again as requiring the contract "to be embodied in a particular form." These I think to be two different things. Neither of these theories is essential to the discussion. Both of them may well have been peculiar to the writer of the opinion; any of the judges may have rejected either or both of them. In assuming that all the reasoning of the judge who gives the opinion is that of all the

judges who are silent in their assent to the judgment which it explains, the learned critic overlooks, for the moment, facts that are familiar to the legal profession.

2. As regards the Richardson case, it was cited in the book referred to — by a reference to a *particular page in the Report* — as illustrating the point that what are called questions in the law of evidence are very often, in reality, questions belonging to some other part of the law; a man, it was said, who mistakes the proposition of substantive law on which his case turns, and offers evidence accordingly, is often told that his evidence is not admissible, when the real thing meant is that he is wrong in his notion of the true proposition of the issue; for example, as to the true legal standard of diligence. This was one of several illustrations. The plaintiff in error, in Richardson's case, in repelling the charge of negligence, had offered evidence of "the usual practice of railroad companies in that section of the country." The court, in sustaining the rejection of this evidence, after stating that it is "impossible for us to see any reason" for admitting it, pointed out, on the page cited, what the issue was, and added: "Hence the standard by which its conduct was to be measured was not the conduct of other railroad companies in the vicinity; certainly not their usual conduct. Besides," etc. This I understand to be a statement that the plaintiff in error appears to be wrong in his conception of the true standard of negligence, and that the evidence was inadmissible upon the real issue. The citation of this passage seems to be a fair one, as illustrating the point to which it is applied. With the soundness of the decision, in rejecting the evidence, I was not, and am not now, concerned.

When, therefore, the critic asks, "On what ground is this case banished from the law?" the question is wide of the mark. It is not "banished from the law." It is used as furnishing, in a particular argument of the judge, an illustration for a remark in the text, — a remark which has to do with the exclusion of certain matters from the law of evidence, but not at all with excluding them from "the law."

3. This brings me to the main point, viz., what the critic says as to the theory of the law of evidence which is put forward in the book referred to. That theory is that our law of evidence is a *rational* system, as contrasted with certain older modes of proof; that in admitting evidence in our law, it is always assumed to be logically probative, *i. e.*, probative in its own nature, — according to the rules that govern the process of reasoning; that the consider-

ations determining this logical quality are not fixed by the law, and that, so far as legal determinations do proceed merely on such considerations, they do not belong to the domain of law; that the law of evidence, however, *excludes* much which is logically good, that is to say, good according to the tests of reason and general experience; and that the rules of exclusion make up the main part of the law of evidence. The reasons for these views, and the details and qualifications of them, are not for this place: they are indicated in the book referred to.

Now this book uses the word "relevancy" merely as importing a logical relation, that is to say, a relation determined by the reasoning faculty. The word "admissibility" is the term which it applies to the determinations of the law of evidence. The critic seems not to observe this; and his remarks, for this reason, are in some respects inapplicable to the text that he is dealing with; as when he says that "logic furnishes no test of relevancy."

I confess that I do not know what he means when he imputes to me the doctrine that "the law of evidence begins only when the courts, either unconsciously or purposely, violate the rules of logic concerning the relevancy of evidence." So far as I perceive the meaning of this passage, it seems to be a senseless opinion. The law of evidence begins — at least its main function begins — when it excludes matter logically probative, for one or another of the many practical reasons that have shaped its principles and its rules. That irrelevant matter is to be excluded is matter of course; that is to say, such matter is outside the very notion of "evidence," in a rational system of evidence like ours.

The critic appears to me to be entirely right in saying that the judgment of a court "has the same value in this branch of the law that it has in any other branch." Doubtless, it settles the particular case. It stands also, if it does stand, as a precedent to help settle other like cases. But bad reasoning in the law of evidence, like bad reasoning in all other parts of the law, is simply bad reasoning; and it is never good law. It may, to be sure, change the law; and the result reached by it may stand as a new proposition in the law of evidence, as in any other part of the law. But the bad reasoning itself never passes into a precedent having legal authority. It is always open to question. The law has no orders for the reasoning faculty, any more than for the perceiving faculty, — for the eyes and ears.

Of course I agree entirely with the critic that our courts are not engaged in reaching "mathematical conclusions," or in merely logi-

cal, abstract, or academic discussions. For the evidence of this agreement I respectfully refer him to the book in question, — *passim*. It is with entire satisfaction that I look on at the destruction by the critic of that man of straw put forward in his paper who seems to have entertained a different opinion.

J. B. Thayer.

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THE MILEAGE BOOK LAWS. — Several states have recently enacted that all railroad companies within the state should sell one thousand mile tickets at a certain price. The constitutionality of a Michigan statute to this effect was lately before the Supreme Court of the United States. *Lake Shore, etc. R. R. Co. v. Smith*, 173 U. S. 684. It was admitted that the state had power to fix maximum rates, but the statute was held unconstitutional on the ground that this regulation was unreasonable, as discriminating in favor of a portion of the public, — namely, the class that could afford to buy such a ticket, — and therefore constituted a taking of property without due process of law. The chief justice and two associate justices dissented. A similar enactment has since been passed upon in two New York decisions. In the earlier case, as the railroad company apparently had received its charter after the act was passed it was held to have contracted, upon sufficient consideration, to surrender its right to refuse to issue such tickets. *Purdy v. Erie R. R. Co.*, New York Law Journal, March 9th, 1900. In the later case, as it was shown that the company's charter antedated the act, the court felt obliged to follow *Lake Shore, etc. R. R. Co. v. Smith*, *supra*, *Beardsley v. Erie R. R. Co.*, New York Law Journal, March 9th, 1900.

"Due process of law" is generally stated to be synonymous with "the law of the land," referred to in *Magna Charta*. The phrase is therefore to be interpreted broadly, as meaning the provisions of the constitution and the fundamental principles of justice as established for the last five or six hundred years. A law, therefore, to be unconstitutional under this clause, must be not merely oppressive, but purely arbitrary. No matter how unjust or inexpedient it may seem, if it can be regarded as a reasonable exercise of the legislative function it must be upheld. And since a corporation engaged in a public employment depends entirely on the permission of the state for its liberty to carry on such business, clearly the state — which granted its charter, and which can

revoke it — should also have full power to regulate the corporation in its occupation. As was well said in *Munn v. Illinois*, 94 U. S. 113, speaking of one who has entered on a public undertaking: "He may withdraw his grant (to the public) by discontinuing the use, but so long as he maintains the use he must submit to the control." Notwithstanding this undoubted police power of the state, it has been decided, and in spite of considerable adverse criticism, correctly, it would seem, that the legislation may not be such as to deprive one engaged in such public employment of the reasonable profits of his investment. *Smyth v. Ames*, 169 U. S. 467; 12 HARVARD LAW REVIEW, 50. But even under this liberal view, which certainly reaches the verge of the law, it is difficult to support the mileage book case. It was not contended by the railroad that the rate fixed by the legislature was so unreasonably low as to prevent its operating at a profit, which it would seem could be the only possible ground for the decision. In fact, it appears that similar tickets were actually sold by other roads at as low a rate. The decision was squarely placed by the court on the ground that it made an "exception in favor of a particular class," — those who can afford to buy tickets by wholesale. But how can it be favoritism when the statute expressly enacts that the ticket shall be sold to all? Would the court be prepared to hold that an act fixing a ferry fare at two cents was unconstitutional because it discriminated against that portion of the community which did not happen to have two cents? Yet that would seem a legitimate deduction from the actual decision. It is perhaps unfortunate that the New York court was not able to distinguish the second as well as the first case from the Supreme Court decision, for were the matter again brought before the latter court it is possibly not too much to hope that it might find the circumstances sufficiently changed to warrant a decision in favor of the constitutionality of the law.

TRIAL BY EIGHT JURORS. — The Supreme Court of the United States has recently decided that a provision in the constitution of Utah to the effect that in criminal trials, other than capital, a jury shall consist of eight jurors, is not in violation of any of the provisions of the Federal Constitution. *Maxwell v. Dow*, 20 Sup. Ct. Rep. 448. In view of the admission that the question involves the right of a state to do away entirely with trial by jury in state courts, and since this is the first decision on this particular point by the Supreme Court, the case is obviously of great importance.

The opinion involved the consideration of two distinct contentions made by the plaintiff in error. It was argued, first, that a trial by a jury of twelve in a criminal prosecution is a privilege or immunity of a citizen of the United States which, by section 1 of the Fourteenth Amendment, a state is forbidden to abridge. But the court held that the right to a trial by jury in a state court for a state offence had never been a privilege or immunity of a citizen of the United States, because the Sixth Amendment, which provided for trial by jury in criminal prosecutions, had been adopted to protect the people only against encroachments by the federal government, and did not apply to trials under control of the individual states. It was further contended that imprisonment after a trial before a statutory jury of eight was a deprivation of liberty without due process of law, and therefore again in violation of the Fourteenth Amendment. But the court expressed their opinion that trial by jury had never been affirmed

to be a requisite of due process of law, and that a trial and conviction was due process so long as it was in accordance with the law of the state, and so long as that law was not of an arbitrary or discriminating character.

On both points Mr. Justice Harlan delivered a vigorous protest. But as a logical conclusion of law, the opinion of the majority is undoubtedly correct; and from the standpoint of expediency there seems to be no danger in intrusting to the individual states the power to regulate the form of their trials. The decision is, moreover, in conformity with previous decisions of the state courts on the precise point, *In re McKee*, 57 Pac. Rep. 23 (Utah); and of the United States Supreme Court on analogous questions, *Walker v. Sauvinet*, 92 U. S. 90; *Missouri v. Lewis*, 101 U. S. 22. See 10 HARVARD LAW REVIEW, 440. The present decision was especially anticipated in *Hurtado v. People of California*, 110 U. S. 516, which decided that an indictment by a grand jury for a state offence was not constitutionally necessary, and further pointed out that the result reached in the principal case must logically follow.

As to the consequences likely to ensue from this decision, it is not probable that state legislatures have felt constrained in their legislation in anticipation of a contrary result, and therefore any immediate changes in the methods of trial in the various states need not be expected; but the decision certainly does bring to the attention of the state legislatures their powers over these matters, and in view of the discussion of late years as to the advisability of jury trials, it is possible that some novel legislation may result.

SALE OF THE PARTNERSHIP ASSETS BY LESS THAN ALL THE SURVIVING PARTNERS. — The nature of a partner's interest in the partnership assets is very neatly brought out in a recent Australian case. *Rees v. Duncan*, 21 Australian Law Times, 205 (Victoria). One of four partners died, and the partnership was thereby dissolved. Two of the surviving partners and the representatives of the deceased partner sold "all their right, title, and interest" in the partnership assets to the plaintiff. In a suit against a stranger for the conversion of the assets, the court held that the legal title to the partnership assets was vested in the surviving partners by survivorship as joint tenants, in trust for the firm, and that no legal interest was transferred to the plaintiff. Consequently the plaintiff failed in his suit.

The decision seems clearly right. The position of a partner as regards the partnership assets is wholly anomalous. The common law conception is that the legal property is in the partners as joint tenants. Yet so far is the mercantile idea that partnership is an entity recognized, that a partner cannot transfer his interest in specific property. *Parsons' Partnership*, 4th ed. § 178; *Nichol v. Stewart*, 36 Ark. 612. Though in the principal case the partnership was dissolved by the death of a partner, the partnership still subsisted in equity and in mercantile contemplation as a body which owns property and owes debts. Its existence could not be terminated until the business was wound up and final distribution made, and the survivors therefore have no more right to transfer property for other than partnership purposes after the dissolution than before. *Strauss v. Frederick*, 91 N. C. 121.

The principal case rightly held that the deceased partner's interest passed on his death to the surviving partners, disregarding the sporadic

decision of *Buckley v. Barber*, 6 Ex. 164, which, acting on the principle that *jus accrescendi inter mercatores locum non habet*, held that as regards chattels belonging to the firm there is no survivorship. This case made a useless and unsound distinction between land, debts, and chattels. It seems never to have been followed in the United States, and in England has been taken care of by statute. It is further interesting to note that the court repudiates the much discussed decision of *Knox v. Gye*, L. R. 5 E. & I. 656, that there is no fiduciary relation between the surviving partners and the executor of a deceased partner, and in accord with an earlier Victorian case, *In re Falk*, 18 V. L. R. 589, adopts the dissenting opinion of Lord Hatherley, that the survivors hold the assets as joint-tenants in trust for the firm. While to-day this matter has been said to be largely a question of terminology, it has certainly caused a large amount of confusion in the courts, — many following Lord Westbury, in *Knox v. Gye*, *supra*, that there is no fiduciary relation whatever, others holding the relation to be purely that of trustee and cestui, *Hill v. Draper*, 54 Ark. 395, while others again say the position of the surviving partners is anomalous, "not exactly and wholly trustee and yet not a full owner of the assets." *Russell v. McCall*, 141 N. Y. 437. It may well be doubted, notwithstanding the great authority of Lord Westbury, whether the view of the principal case is not the better; for the relation in its essential attributes would seem to be fiduciary.

LUMPING OF ORDERS BY AN AGENT. — The question whether an agent, having received orders from various principals, can, by joining them and entering into a contract with a third person for the whole amount, bring the third person into contractual relationship with each of the principals, is a question of thoroughly practical application. In the recent case of *Beckhusen and Gibbs v. Hamblet*, 16 Times L. R. 278, it was answered in the negative. The defendant had given a broker orders to purchase two hundred and ten shares of stock. Having an order for one hundred and fifty shares of the same stock from another customer, the broker lumped the orders and purchased three hundred and sixty shares from the plaintiffs. The broker failing, the plaintiffs learned from him the names of his principals, and then sued the defendant for loss incurred with regard to his proportion of the stock. The court held that no contractual relationship had been established between the plaintiffs and the defendant, the contract with the plaintiffs being solely with the broker and not with either of his customers.

If the broker had made two separate contracts for the precise number of shares ordered by each customer, each would have been liable to the seller on his own contract, whether the broker disclosed his principals or not. And at first sight it seems odd to say that when the broker does the very common act of lumping the two orders, the person with whom he contracts loses all right to proceed against the customers. Yet on closer examination the decision in the principal case is seen to reach the only logical result. A contrary view would lead to one of the following conclusions: either that the principals had incurred a liability jointly or severally, or jointly and severally; or that a contract exists with each principal for his proportionate share. The first view is on its face untrue, for the principals had no relations with each other. The second is equally untenable, for the contract made by the agent was one entire

contract which cannot be split up. The terms may well have been different because of the size of the contract, and the whole transaction was on the understanding that but a single liability was to be incurred on each side. We must say, then, that the contract was between the third person and the agent only, and that by such a contract it is impossible to make the principals and the third party liable to each other. The principal case is the converse of *Roosevelt v. Doherty*, 129 Mass. 301, where the action was brought by one of the principals against the third party. The decision there supports that of the present case, but the question is dealt with by the court as if it were peculiar to the doctrine of undisclosed principal. It is evident, however, that, even had the principal been disclosed, the result must have been the same. As the case under discussion, where the principal was also undisclosed, proceeds on the broader ground, it is particularly valuable.

It is indeed possible to regard a stock broker not as an agent but as an independent buyer and seller. Accordingly the doctrines of agency would not apply, and in no case would the persons from whom and for whom he bought be directly liable to each other. It may well be doubted whether this view, though not recognized by the courts, is not more consonant with business usage.

LIMITATION OF LIABILITY BY A CARRIER.—That a common carrier may not lawfully contract against liability for injuries resulting to passengers from the negligence of its servants is a rule of almost universal application. *Railway Co. v. Lockwood*, 17 Wall. 357. Public policy requires such a rule for a twofold reason. Since the carrier has virtually a monopoly, and since the exigencies of business often require a man to get immediate transportation, though it may be at the sacrifice of his legal rights, it has its patrons at such a great disadvantage that it can readily exact from them a stipulation that it shall not be liable for negligence. In the great majority of cases also, the carrier gives nothing in return for this release of its common law obligation, and the agreement is therefore without consideration. Moreover, even though there may be consideration for such a contract, the welfare of the state requires that a common carrier should not be allowed to make any diminution in the care taken to protect its passengers from harm, and it is clear that a general limitation of that sort might readily result in a relaxation of its precautions to prevent accidents.

Whether one who is travelling on a gratuitous pass is to be put within the same category is a matter on which the authorities are in conflict. Some courts hold that the same grounds of public policy prohibit such a limitation as well in the one case as in the other. *Jacobus v. St. Paul, etc. R. R. Co.*, 20 Minn. 125. The better view, however, would seem to be that such a limitation is lawful. Clearly he is in no way at the mercy of the carrier in being forced to give up his common law rights, for he may, of course, pay his fare and retain such rights. Likewise it is evident that his being carried free is a sufficient consideration for the surrender of his right that the carrier be not negligent. Nor can it be said that this is likely to increase the recklessness of the carrier generally, and so has a tendency to injure other members of the public, for by the practice of issuing passes the carrier loses rather than gains, and it is probable, therefore, that free passes will be granted in only a very limited number of cases. Consequently there is no sound reason why public policy should

restrain a carrier from enforcing against the holder of a gratuitous pass an agreement by which the latter must bear the risks of transportation. *Quimby v. Boston, etc. R. R. Co.*, 150 Mass. 365.

Although this matter has been considered in not a few common law decisions, until recently it has seldom, if ever, come up in a court of admiralty with regard to carriers by sea. The judgments of a court of admiralty, though not professing to follow common law decisions, are often based on principles quite analogous to the common law rules. And obviously the above reasons of public policy in regard to this matter apply equally well to carriers by sea. It is gratifying to note, therefore, that the English admiralty court has lately decided the question in accord with what seems to be the sounder view. *The Stella*, *The Law Times*, April 14, 1900.

DUTY TO LOOK OUT FOR TRESPASSERS ON A RAILROAD TRACK. — The employees of a railroad company, while operating a train, are, in most jurisdictions, held to a duty of using reasonable care under the circumstances towards trespassers on the track, after they have been seen, but to no obligation to keep a lookout for them. *Cheury v. Fitchburg Ry. Co.*, 160 Mass. 211; *Scheffler v. Minneapolis & St. L. Ry. Co.*, 121 N. W. Rep. 711 (Minn.). A broader duty to use reasonable care to look for trespassers has, however, been recognized in a few courts. *Texas & P. Ry. Co. v. Watkins*, 29 S. W. Rep. 232 (Texas Sup. Ct.); *Pickett v. Wilmington & Weldon R. R. Co.*, 117 N. C. 616. In a recent case, where a trespasser was killed by a train, the court agreeing with the first and generally accepted view, held that the duty of using reasonable care only existed after the trespasser was seen. *Cleveland, C. C. & St. L. Ry. Co. v. Tarrt*, 99 Fed. Rep. 369 (C. C. A., Seventh Cir.).

Recovery has been sometimes barred in such cases on the ground that contributory negligence is proven by the mere act of trespass. But by the better authority a trespass is only evidence, not conclusive proof of negligence. Therefore one who trespasses without thereby incurring such risk as to be called negligent, and who suffers an injury which might have been averted had the engineer been reasonably watchful, can be barred of an action only because the latter is not bound to keep a lookout. But if reasonable care is required towards such trespassers as are seen on the track, on the principle that acts causing probable damage to others are forbidden, why should no care be required towards such as are likely to be on the track, and to be injured unless warned? Certainly an engineer cannot assume that no one will commit the merely technical wrong of walking on or crossing the track when he knows that at a certain place such trespassing is frequent, or that some special circumstance, such as a fire close to the track in a city, makes it extremely probable. Accordingly a failure to look out for trespassers can be warranted only on the ground that the engineer's other duties of watching his machinery, and regulating his time and speed, involve such serious consequences to a large number of passengers, that he should not be turned from them by an additional duty towards persons voluntarily incurring a certain risk. But as the measure of care should be only that which circumstances make reasonable, no duty exists to keep a lookout when more important duties interfere.

Frequent accidents would be the inevitable result of running fast trains if no lookout whatsoever were kept. Apparently it is only the assump-

tion that the engineer is to some extent watchful, which prevents the more general passing of statutes requiring a constant lookout on the track ahead, and keeps the running of trains, without this precaution, from being, in truth, negligence *per se*. It would, therefore, seem no great hardship, in spite of the difficult question of fact which must consequently be sent to the jury, to require of engineers, as a legal duty, that reasonable care under the circumstances, which it is assumed they ordinarily use.

ADVERSE POSSESSION. — A recent Alabama case is of interest as illustrating the nature of adverse possession. The plaintiff's ancestor, in 1867, purchased land upon an execution sale, without obtaining a release of dower from the execution debtor's wife. The former owner, however, remained in possession until his death in 1870, and thereafter the widow and children occupied the land, the widow paying the taxes, until 1887, when the widow died. The plaintiff then sued the children in ejectment, and recovered judgment. The court held that the possession of the widow being under her statutory right of quarantine which allowed her to remain in possession until dower was assigned, was neither a continuation of her husband's possession, nor adverse to the plaintiff's legal title. *Robinson v. Allison*, 27 So. Rep. 461 (Ala.).

Undoubtedly the possession of the widow was not adverse to the plaintiff's claim, if it was in pursuance of her statutory right of quarantine. For in that case the fact that her possession was lawful barred the plaintiff's right to bring ejectment and prevented the running of the statute. The rule would serve to work a hardship upon the children in such a case, but that is a necessary consequence. The court went farther, however, and held that no assertion of ownership on the part of the widow could make her possession adverse, as she would nevertheless be secure in her right to possession until the dower was set out. Yet this does not seem to be sound. In this country a lessee may disaffirm orally and thereafter hold adversely to his landlord's title, and on principle there seems to be no good reason why a widow may not do the same as to her statutory right of quarantine. Obviously a claim of fee by the widow must be open and notorious, and in a case like the one under discussion, it must be clearly proved. But if the fact were actually established, her adverse possession for the statutory period should allow her to transmit the fee to her heirs. A similar result might possibly be reached in another way. The fact that the widow and children continued in possession might be said to indicate that the children claimed their father's tortious fee by descent subject to the widow's right to dower in that tortious estate. Then the children should be protected after the running of the statutory period. They could even tack their adverse possession to that of their father if that were necessary. Yet to adopt this latter view would be to put a strained interpretation on the facts. On the ground, however, that the widow did actually claim a fee — and the report of the case indicates that there was evidence to that effect — the decision in the principal case would seem to be questionable. That the widow's possession might have been lawful, had she not claimed the fee, should not, it seems, utterly deprive her of all power of holding adversely.

CONTRACT FOR THE SUPPLY OF INDEFINITE BUSINESS REQUIREMENTS. — A promise by one party to buy all the ice necessary for carrying on his business of ice dealer was, in a recent case, held good consideration for a promise to supply such a quantity at certain prices. *Hickey v. O'Lrien*, 82 N. W. Rep. 241 (Mich.). The decision is important, for although contracts to meet indefinite business requirements must be frequent, the few cases testing their validity are in conflict. The weight of authority is in accord with the principal case. *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427; *Smith v. Morse*, 20 La. Ann. 220. But in some courts the contrary view has prevailed. *Bailey v. Austrian*, 19 Minn. 535; *Keller v. Y'Barru*, 3 Cal. 147.

In *Bailey v. Austrian*, *supra*, the leading case in support of the latter view, the plaintiffs agreed to purchase of the defendant all the pig iron they might want in their business during a specified time. The court held the contract invalid, because the plaintiffs did not "agree to want any quantity whatever:" as by discontinuing business they could avoid all obligation, and thus were bound by no positive agreement. In the principal case the court, while rightly differing from this decision, met the objection it offered on the untenable ground that since it must be presupposed that the business would continue, the purchase of some ice was in truth agreed upon. But the promisor made no stipulation to keep up the business, and he was, therefore, at liberty to act so as to incur no obligation to buy. The true test of validity in such a case is not whether the promise made necessary the purchase of some ice, but whether it fettered, or might have fettered, the promisor's conduct? Such clearly was the effect of the present promise. The promisor made an absolute engagement to refrain from buying ice for business purposes from any one but the promisee. His free action was hampered, for he had either to incur an obligation, or to give up his business. Therefore, while the reasoning of the principal case would seem unsound, its conclusion is obviously correct.

The decisions opposed to this view are apparently based on the supposition that a promise to buy whatever materials one may need in business is like a promise to do something entirely at one's pleasure, as, for example, to pay whatever wages one may please or see fit. But the two differ essentially. The latter, unless interpreted to mean performance or payment of what is reasonable, constitutes no true promise. No intention is expressed; no expectation of performance excited. It is in effect a mere statement, under the guise of a promise, that one will do what he will do. A promise like that in the principal case, however, which imposes a restriction on the promisor's free action, affords, as was decided, a perfectly good consideration.

NEGLIGENCE OF A BAILEE IMPUTED TO HIS BAILOR. — Few questions have led to such dispute and confusion as that of imputed negligence. In a recent case a mule, lent by the plaintiff, was injured by the concurring negligence of the bailee and the defendant. It was held that the bailee's negligence must be imputed to the plaintiff and was therefore a bar to his recovery. *Illinois Cent. R. R. Co. v. Sims*, 27 So. Rep. 528 (Miss.). The decision is opposed to the true rule of contributory negligence, which denies recovery only where the plaintiff's own negligence, or that of his servant or agent, has contributed to cause the injury. The defendant's

wrong, in such a case, is not lessened, but public policy and justice demand that as long as damages at common law are not apportioned as in the admiralty courts, no one himself causing or responsible for another's causing, his own injury, shall shift the burden of it even upon a party who cannot deny having been in the wrong. The facts of the principal case do not bring it within this rule. The plaintiff was not responsible for his bailee's acts; he could not have been held liable to one whom the latter negligently injured while driving the mule. On principle, therefore, recovery should have been allowed, as the plaintiff was without fault and had been injured by a wrongful act of the defendant, — the fact that another had been equally in the wrong with the defendant furnishing the latter with no excuse.

There are few decisions in point. In one line of cases where a shipper's goods, in the possession of a carrier, have been injured by the concurring negligence of the carrier and a third person, the shipper has been denied an action against the latter. *Arctic Fire Ins. Co. v. Austin*, 69 N. Y. 472. These cases are supportable only on the questionable ground that since the carrier is an absolute insurer, public policy should in licit on him the consequences of any loss. It is clear that these decisions, whether sound or not, do not govern the principal case. Two early American decisions, wherein the point received no consideration, support the case under discussion. On the other hand, the New Jersey court, in an able opinion, has recently denied the doctrine of imputed negligence under similar circumstances. *New York, etc. R. R. Co. v. New Jersey, etc. R. R. Co.*, 60 N. J. Law, 338. Further, the analogous cases which allow one injured in a hired carriage by the concurrent negligence of the driver and a third person to bring action against either party, point to the same result. *Randolph v. O'Riordan*, 155 Mass. 221. Such scant authority as can be mustered to the support of the principal case, coming, as it does, from a time when the doctrine of imputed negligence was much befogged, and being contrary to principle, would seem, therefore, to afford no justification for the decision.

DISCHARGE OF JURY ON FAILURE TO AGREE. — The question has recently been raised in an Illinois case as to whether the discharge of a jury by the court without the prisoner's consent, because of its inability to reach a verdict, is a bar to a second trial on the ground of former jeopardy. *People ex rel. Dreyer v. Magerstadt*, Circuit Ct., Cook Co., Ill., National Corporation Reporter, April 19, 1900. The court, after an exhaustive review of the authorities, concluded that the state constitution, which declared that no person shall be twice put in jeopardy for the same offence, had not been violated by a second trial of the accused.

There is no doubt that this decision is in accord with the almost universal current of opinion both in England and in the United States, though the contrary view prevails in five or six states. *Com. v. Fitzpatrick*, 121 Pa. 109. Nevertheless the general rule is the more modern, and on theory not free from objections. In the first place, it cannot be denied that the accused in such cases as the present has been put in jeopardy by the first trial. There was no defect in the indictment or in the proceedings — nothing to prevent a valid conviction had the jurors agreed. The defendant left his case with them, and would seem to be entitled to a verdict from their mouths. The situation is clearly different from that

where physical obstacles prevent a verdict, for in such cases it may be said there was no real jeopardy, since the trial could not proceed to the stage where the jurors should give their verdict. Moreover, historical considerations further raise in this country certain constitutional objections. The old common law view was that the jury could not be discharged "except in cases of evident necessity," 4 Bl. Com. 360, meaning thereby physical necessity, such as the death or severe illness of a person necessary to the trial. Mere inability to agree was never a good ground for discharge. The jury were to be kept without meat, drink, or fire until they should reach a verdict; and if the jury were discharged because they disagreed the accused could not be tried again. *Conway and Lynch v. The Queen*, L. R. 9 Ir. 149. Such was the view held at the time of the adoption of the Federal Constitution and of the constitutions of the earlier states. Hence where those constitutions provide against double jeopardy, it would seem unconstitutional to hold that the accused could be retried. This was the reasoning of *Com. v. Cook*, 6 S. & R. 576.

It has, however, been almost universally agreed that convenience and public policy must outweigh these technical objections, and that the prisoner may be tried again. In England the rule was so settled in 1866, *Winsor v. The Queen*, L. R. 1 Q. B. 289; the United States Supreme Court early adopted this view, *United States v. Perez*, 9 Wheat. 579; and most of the state courts have followed suit. *People v. Greene*, 13 Wend. 55; *Com. v. Purchase*, 19 Mass. 521. This result is also beneficial from the defendant's point of view, for where a verdict is compelled through physical pressure it is as likely to result unadvisedly against the prisoner as in his favor. It is much better to have a system in which the unanimity of the jury shall, as is said in *Winsor v. The Queen*, *supra*, be the result of nothing but the unanimity of conviction, and in which, when that cannot be, a new trial may be had.

RECENT CASES.

AGENCY — FRAUDULENT WAREHOUSE RECEIPT — ESTOPPEL. — The defendant's agent fraudulently issued a warehouse receipt for grain which he had not received. The receipt was transferred to the plaintiff for value without notice. Held, that the defendant is estopped from denying its validity. *Fletcher v. Great Western Elevator Co.*, 82 N. W. Rep. 184 (S. D.).

By the great weight of authority the holder of such a receipt cannot recover in any form of action. *Grant v. Norway*, 10 C. B. 665; *Pollard v. Vinton*, 105 U. S. 7; *National Bank of Commerce v. Chicago, etc. R. R. Co.*, 44 Minn. 224. Some cases, however, in accord with the principal case, hold that, on account of the commercial use made of bills of lading and warehouse receipts, they are in effect representations to subsequent holders that the goods have been received, and so contract will lie. *Armour v. Michigan Central R. R. Co.*, 65 N. Y. 111; *Sioux City, etc. Ry. Co. v. First Nat. Bank*, 10 Neb. 556. But, even granting that they are such representations, it seems that the proper remedy would be in tort for the fraudulent misrepresentation, instead of on the contract by estoppel, for the subsequent holder is only an assignee of the original fraudulent holder, and is, therefore, bound by defences to an action of contract good against him. Moreover, in this case, the act of the agent is clearly without the scope of his authority, and, accordingly, the defendant can in no sense be said to have made a representation.

AGENCY — LIABILITY OF PRINCIPAL — LUMPING OF ORDERS BY AGENT. — A broker, having received orders from two separate customers for shares of a certain

stock, joined the orders and purchased the full amount from the plaintiffs. *Held*, that the sales did not bring the plaintiffs into contractual relations with either of the principals, and they are, therefore, not liable for the price. *Beckhusen v. Hamblet*, 16 T. L. Rep. 278 (Q. B. D.).—See NOTES.

AGENCY — RATIFICATION — UNDISCLOSED PRINCIPAL. — One R. purchased grain of the plaintiffs, intending to act for the defendants, but without their authority and without disclosing his assumed agency. *Held*, that a ratification by the defendants makes them liable upon the contract. *Durant v. Roberts*, [1900] 1 Q. B. D. 629 (C. A.).

The question here involved comes midway between two well settled classes of cases. Where the quasi-agent in making a contract discloses his assumed authority, a subsequent ratification is effectual. *Watson v. Swann*, 11 C. B. N. S. 771. On the other hand, an attempt to ratify a contract made for another is a mere nullity. *Saunderson v. Griffiths*, 5 B. & C. 909, 915; *Richardson v. Payne*, 114 Mass. 429. The case is supportable, if at all, as an extension of the undisclosed principal doctrine to facts showing no actual agency, and while there appear to be no direct decisions on the point, it is opposed to numerous *dicta* and expressions of text-writers. *Wilson v. Tummam*, 6 M. & G. 236; Dic. Par. 132. The whole doctrine is so anomalous on principle that this extension is not surprising, but to hold that the secret intent of a contracting party makes his act that of an agent, and, therefore, subject to ratification, is certainly opposed to the general policy of the law, and from a business point of view cannot be commended.

BANKRUPTCY — PRIORITY OF CLAIMS — WAGES. — The Bankruptcy Act of 1898, in § 64 b (4), gives priority to claims for wages of workmen, clerks, and servants. *Held*, that a travelling salesman does not come within this provision. *In re Greenwald*, 99 Fed. Rep. 705 (Dist. Ct., Pa.).

Such clauses in bankruptcy laws should, it seems, for reasons of policy, be liberally construed in favor of the preference. Moreover, the tendency of the decisions has been in this direction. Thus, in England the mate of a vessel has been held a servant of the owner, *Ex parte Hamburg*, 2 Mont. D. & D. 642; and an editor of a newspaper a servant or clerk of the proprietor, *Ex parte Jennings*, 7 L. T. N. S. 601; and on exactly the facts of the principal case, the opposite result was reached, *Ex parte Neal*, Mont. & Mac. 194. Similarly, under the Act of 1867, § 28, giving priority to "claims for wages of operatives, clerks, and house servants," it was held that wages due a person hired to examine the books of the bankrupt constituted a claim entitled to priority. *Ex parte Rockett*, Fed. Cas. No. 11,977. Both on principle and authority, therefore, the result reached in the present case is questionable.

BANKRUPTCY — PROVABLE DEBTS — ARREARS OF ALIMONY. — *Held*, that arrears of alimony do not constitute a claim provable in bankruptcy. *In re Nowell*, 99 Fed. Rep. 931 (Dist. Ct., Mass.).

The same result was reached under § 19 of the Bankruptcy Act of 1867. *In re Sachmeyer*, Fed. Cas. No. 7966; *In re Foye*, Fed. Cas. No. 5021. The present Act, in § 63 (1), provides that any fixed liability absolutely owing at the time of the filing of the bankrupt's petition constitutes a debt provable against the estate. If, then, a claim for arrears of alimony is a fixed liability according to the law of the state where the allowance is made, it can be proved as a debt. *In re Challoner*, 98 Fed. Rep. 82 (Dist. Ct., Ill.); *In re Houston*, 94 Fed. Rep. 119 (Dist. Ct., Ky.). In New York and Massachusetts, however, such arrears can be reduced on application by the husband upon his showing a change in his circumstances, or in those of his wife. *In re Shepard*, 97 Fed. Rep. (Dist. Ct., N. Y.); *Southworth v. Treadwell*, 168 Mass. 511. The claim, therefore, is not fixed, and, accordingly, the decision in the principal case is correct.

BILLS AND NOTES — AGENCY — PAROL EVIDENCE. — A note was signed "A. B., Sec'y The X Y Co." *Held*, that, between the original parties, parol evidence of an understanding that the note should be the note of the company is admissible. *Jones v. Citizens' Bank of North Enid*, 60 Pac. Rep. 290 (Okla.).

The decisions on this point are in hopeless conflict. In many states the rule is that even between the original parties nothing outside of the writing itself can be looked at to determine who is liable, and the signer is held personally, on the ground that the official title added to his name is mere description. *Tucker Manufacturing Co. v. Fairbanks*, 98 Mass. 101, *Williams v. Second Nat. Bank*, 83 Ind. 237. In other jurisdictions, however, the courts have, as in the principal case, allowed parol evidence of the actual understanding in order to determine the import of the signature. *Kean v. Davis*, 21 N. J. Law, 683; *Metcalf v. Williams*, 104 U. S. 93. The latter view naturally leads to a more just result, and as any name may be adopted as a signature, there seems to be no reason why an agreement that a certain signature shall bind the prin-

principal rather than the signer should not be given effect, at least between the parties. The principal would not, of course, be bound unless he had authorized the signature.

BILLS AND NOTES — FORGERY — RELEASE OF SURETY. — One of the makers of a note, by means of a forged signature induced the defendant to sign it as surety. *Held*, that the defendant is liable to the payee who gave value and had no notice of the fraud. *Wheeler v. Trader's Deposit Bank*, 55 S. W. Rep. 552 (Ky.).

The result of this decision is correct and is supported by the great weight of authority. *Selzer v. Brock*, 3 Oh. St. 302; *Stoner v. Mulikin*, 85 Ill. 218. *Contra*, *Green v. Kent*, 43 Mich. 279. The reasoning, however, in this and many other cases is unsatisfactory. The surety does not by the nature of his contract warrant the genuineness of the signature. Nor is negligence the ground of his liability, for he is held irrespective of the amount of care used. Both of these reasons are, however, sometimes given. Moreover, the suggestion that of two innocent persons the one trusting the deceiver must suffer is too loose and indefinite a principle to furnish a sound basis for the decisions. The true ground is that the payee takes free from conflicting equities between the several makers or obligors of which he has no notice, *Selzer v. Brock*, *supra*, for, though an immediate party to the instrument, he is, here, a *bona fide* purchaser and should have all the rights of such a purchaser. *Watson v. Russell*, 3 B. & S. 34; *Brooklyn, etc. Ry. Co. v. National Bank of the Republic*, 102 U. S. 14, 47.

BILLS AND NOTES — INDORSEMENT UNDER AN ASSUMED NAME. — An impostor, assuming the name of the owner of certain real estate, managed through correspondence to procure a draft payable to him under that name. This he indorsed for value to the plaintiff. *Held*, that the plaintiff, as a *bona fide* purchaser from the person to whom the draft was sent and for whom it was intended, should be protected. *First Nat. Bank v. American Exch. Nat. Bank*, 63 N. Y. Supp. 58 (Sup. Ct., App. Div., First Dept.). See NOTES, 14 HARV. LAW REV. 60.

BILLS AND NOTES — NEGOTIABILITY — FORMAL REQUISITES. — *Held*, that a stipulation in a note making it payable in New York exchange does not impair its negotiability. *Clark v. Skeen*, 60 Pac. Rep. 327 (Kan., Sup. Ct.).

Under the general rule, that a negotiable instrument must be certain in amount, a provision like that in the principal case is held by the majority of the decisions to render the instrument non-negotiable. *Culbertson v. Nelson*, 93 Iowa, 187; *Nicely v. Winnebago Nat. Bank*, 19 Ind. App. 30. In accord with the present case, there is, however, considerable authority. *Smith v. Kendall*, 9 Mich. 241; *Hastings v. Thompson*, 54 Minn. 184. On principle, it appears that mercantile and not mathematical certainty should be the test. The addition of the current rate of exchange makes the value of the instrument more certain, and the amount is capable of easy and exact ascertainment by means entirely independent of the parties. The principal case takes the better view, therefore, in sustaining the mercantile conception that such instruments are negotiable.

CARRIERS — DELIVERY — LOSS OF LIEN. — The plaintiff, a common carrier, in ignorance of the consignee's assignment for the benefit of creditors, delivered certain goods without obtaining payment of freight. *Held*, that he is entitled to have the assignee sell the goods for the payment of his lien. *Cayo v. Pool's Assignee*, 55 S. W. Rep. 887 (Ky.).

It is doubtful whether any authority can be found for this result. A common law lien is a mere right to retain possession of the goods until the debt is paid, and consequently it is destroyed by delivery, unless the delivery is induced by fraud. *Kittredge v. Freeman*, 48 Vt. 62; *Bigelow v. Heaton*, 6 Hill, 43. Therefore, in the principal case the carrier, by giving up possession of the goods, lost his lien, which was his sole claim for preference over ordinary creditors. Moreover, though he made the delivery in ignorance of the consignee's insolvency, he should not be allowed to regain his lien in equity on the ground of a mistake of fact, because there was no fraud making it unjust for the consignee to hold the goods free from the lien at law. *Sears v. Wells*, 86 Mass. 212.

CONFLICT OF LAWS — CORPORATIONS — LIMITATIONS OF STATUTORY LIABILITIES. — The Georgia statute creating a corporation placed a twenty year period of limitation on the liability of stockholders. The Statute of Limitations on such liabilities in Maryland was three years. *Held*, in an action in Maryland after three years, that the Georgia statute governs the case, and the action will lie. *Brunswick Terminal Co. v. National Bank of Balt.*, 99 Fed. Rep. 635 (C. C. A., Fourth Cir.).

It is well settled that remedies are determined by the law of the forum, and that stat-

utes of limitations affect remedies but not rights. *McElmoyle v. Cohen*, 13 Pet. 312, 327. The exception to this rule made by the principal case, where the limitation is fixed by the same statute that creates the liability, appears indefensible. The court seems to have been misled by the fact that the action could not be brought in a foreign jurisdiction after the time of limitation fixed by the statute creating the liability has expired, because the limitation is there affixed to the right, and when the right is gone there can, of course, be no remedy. *The Harrisburg*, 119 U. S. 199. But, in the principal case, the right is admitted, and since it is purely a question of the remedy, the Maryland statute should govern.

CONSTITUTIONAL LAW — REGULATING POWER — OIL AND NATURAL GAS. — *Held*, that a statute forbidding the waste of oil and natural gas when brought to the surface is not unconstitutional as a taking of private property without due compensation, since the landowner has no title in the oil and gas until they are actually reduced by him to possession. *Ohio Oil Co. v. Indiana*, 20 Sup. Ct. Rep. 576.

The court employs an analogy which has frequently been used between these substances and animals *feræ naturæ*. Game laws, prohibiting the reckless slaughter of such animals, are within the police powers of the states. *State v. Rodman*, 58 Minn. 393. There is, however, an important distinction in that wild animals are public property, under the complete control of the state, *Geer v. Connecticut*, 161 U. S. 519, 525, while oil and gas are subject to the right of those who own the fee of the surface to reduce them to possession. *Jones v. Forest Oil Co.*, 194 Pa. 379. Moreover, it seems that the oil in the present case might well have been treated as reduced to possession by the act of bringing it to the surface. On the whole, therefore, it is to be lamented that the court did not rest its decision on the broader ground that, though the oil is private property, the public has an interest in it, and should be allowed to make any reasonable regulation necessary to preserve this interest. In this view of the case, no question of the taking of property arises.

CONSTITUTIONAL LAW — TAXATION — STATE AGENCIES. — *Held*, that a tax imposed by Congress on bonds, required from saloon keepers under state police regulations, is invalid as a tax on the means employed by the state in regulating the liquor business. *United States v. Owens*, 100 Fed. Rep. 70 (Dist. Ct., Mo.).

In view of the relation between the State and Federal Governments the Supreme Court has decided that neither of said governments can impose a tax upon the valid means employed by the other government in executing its constitutional powers, since, thereby, the one government would be given power to control and impede the operations of the other. *M'Culloch v. Maryland*, 4 Wheat. 316; *Dobbins v. Commissioners of Erie County*, 16 Pet. 435; *Collector v. Day*, 11 Wall. 113. Congress accordingly cannot tax judicial process of state courts, *Fifield v. Close*, 15 Mich. 505, nor the official bond of a state sheriff, *State v. Garton*, 32 Ind. 1. This principle, however, seems incorrectly applied in the present case, since the tax in question is in no way a burden on the state or its agents. It bears solely on the saloon keeper, and instead of impeding the operations of the state it rather assists the state in its restrictive policy. Accordingly, it should have been held valid.

CONSTITUTIONAL LAW — TRIAL BY EIGHT JURORS. — The constitution of Utah provides that a jury shall, except in capital cases, consist of eight jurors. *Held*, that this does not abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property, without due process of law, and is, therefore, not in violation of the Fourteenth Amendment to the Constitution. *Maxwell v. Dow*, 20 Sup. Ct. Rep. 448. See NOTES.

CONTRACTS — INSANE PERSONS — EFFECT OF ADJUDICATION. — By statute the contracts of an insane person, whose insanity had been determined by adjudication, were declared absolutely void. *Held*, that a contract by one adjudged insane is valid on proof of his sanity at the time the contract was made, though he had not been readjudicated sane. *Lower v. Schumacher*, 60 Pac. Rep. 538 (Kan., Sup. Ct.).

Such a statute changes the common law rule as to the effect of insanity upon a contract, when it is proved in that particular way, and the question is whether the adjudication is conclusive or simply creates a presumption. As an adjudication speaks only of the time when it is made, to hold it conclusive long after that time and irrespective of changed circumstances merely because there has not been the form of a readjudication would seem absurd. There is nevertheless authority for such an interpretation of the statute. *Radden v. Baker*, 86 Ind. 191; *Kichne v. Wessell*, 53 Mo. App. 667. The better view is, however, that since the law presumes the continuance of a condition once found to exist, a judicial determination of insanity places the burden of establishing

sanity thereafter upon the one seeking to enforce the contract. *Elston v. Jasper*, 45 Tex. 409; *Searle v. Galbraith*, 73 Ill. 269; *Water Supply Co. v. Root*, 56 Kan. 187. This, it is true, is an exception to the general conclusiveness of judgments *in rem*, but from the nature of the subject-matter involved is logically necessary. 2 Black, Judg. §§ 795, 802.

CONTRACTS — MUTUALITY — CONTRACT TO SUPPLY BUSINESS REQUIREMENTS. — *Held*, that an agreement on the one hand to supply and on the other to buy all the ice necessary for a specified time in the business of one of the parties is not void for lack of mutuality. *Hickey v. O'Brien*, 82 N. W. Rep. 241 (Mich.). See NOTES.

CRIMINAL LAW — LARCENY — DISHONESTY OF PROSECUTOR. — On an indictment for larceny it appeared that the prosecutor paid money, expecting to receive counterfeit bills in exchange. *Held*, that the indictment could not be maintained because the prosecutor parted with his property for an unlawful purpose. *People v. Livingstone*, 62 N. Y. Supp. 9 (Sup. Ct., App. Div., Second Dept.).

In this decision the court reluctantly follows *McCord v. People*, 46 N. Y. 470, where the indictment was for false pretences. The reason there stated is that the law does not design the protection of rogues in their dealings with each other. Obviously, however, it is not the injury to individuals but the injury to society with which the criminal law is concerned. That injury is not lessened by the fact that the other party to the transaction is also deserving of punishment. *State v. Crowley*, 41 Wis. 271, which follows *McCord v. People*, *supra*, is decided on the ground that the statutes creating the crime of false pretences were not intended to cover such cases, but the extension of the rule to a common law crime, as in the principal case, has not even that excuse. The whole doctrine is rejected by the weight of authority. *Commonwealth v. Morrill*, 62 Mass. 571; *Cunningham v. State*, 61 N. J. Law, 67.

EQUITY — SUBROGATION — TAXES. — The plaintiff bid in land at a foreclosure sale, and, before he had paid the purchase price or acquired the legal title, voluntarily paid taxes on the property. The validity of part of these taxes was disputed by the former owners. *Held*, on the first hearing, that he cannot charge the former owner since he is not entitled to be subrogated to the rights of the city against him. *Montgomery v. City Council of Charleston*, 99 Fed. Rep. 825 (C. C. A., Fourth Cir.).

Held, on a rehearing, that he is entitled to subrogation to the extent of the admittedly valid taxes, but that he may not litigate the doubtful claim. *Montgomery v. City Council*, 99 Fed. Rep. 834.

The first decision is based on the theory that subrogation will be given only when the plaintiff has paid another's debt to free himself or his property from some liability to the creditor. *Aetna Life Ins. Co. v. Middleport*, 129 U. S. 534. The plaintiff, here, cannot technically claim to come within this rule since he has not the legal title to the land. Subrogation, however, is an equitable doctrine, and should not be hampered by narrow technicalities. Therefore, as the plaintiff was the substantial owner, he can hardly be called a stranger to the property, and might well have been allowed to recover. See *Mosier's Appeal*, 56 Pa. St. 76, 81. Yet, however the first decision be regarded, the modification made at the rehearing is entirely indefensible, since if the plaintiff is a mere stranger, he is entitled to nothing, *Webster's Appeal*, 86 Pa. St. 409, while, if he is not, he should clearly be allowed to litigate the whole claim for what it is worth.

EVIDENCE — NEGLIGENCE — BUSINESS USAGE. — *Held*, that the fact that the defendant's elevator was of a sort in ordinary use under similar circumstances is conclusive evidence of care on his part. *Leonard v. Herrmann*, 45 Atl. Rep. 723 (Pa.).

It may well be doubted, on policy, whether evidence of the customary business usage in such cases should be admitted at all, and at best it should be allowed only to assist the jury in the determination of what is reasonable care. *Martin v. California, etc. Ry. Co.*, 94 Cal. 326. For to hold that business usage is conclusive on the point, is to confuse evidence of the fact with the fact itself. *Maynard v. Buck*, 100 Mass. 40. Moreover, as a practical result of the decision, it appears that employers can completely nullify their liability for unsafe appliances, by their uniform adoption. *Wabash Ry. Co. v. McDaniels*, 107 U. S. 54. The case represents, however, the law of Pennsylvania. *Titus v. Bradford, etc. R. R. Co.*, 136 Pa. St. 618.

EVIDENCE — TRUSTS — DECLARATIONS AGAINST INTEREST. — The plaintiff, a widow, sued for dower in lands conveyed to her husband after marriage, and transferred by him to the defendant. *Held*, that the declarations of the husband, made while he was seized, that the conveyance to him was on an oral trust to convey to the defendant, are inadmissible. *Pruitt v. Pruitt*, 35 S. E. Rep. 485 (S. C.).

It is not clear whether the evidence in question was excluded on the ground that proof of an express trust is irrelevant, or because the evidence offered was incompetent for that purpose. It seems, however, that neither objection is tenable. It is material to show the existence of a valid trust, for if such a trust is shown the widow is not entitled to dower. *Noel v. Jevon*, Free. Ch. 43. Moreover, it cannot be objected that the trust was oral and, therefore, within the Statute of Frauds, for, under the statute, oral trusts are not void but are merely unenforceable. *Gardner v. Rowe*, 2 S. & S. 346. Hence, the lack of a writing is immaterial where the trustee has already conveyed in pursuance of his moral duty. *Main v. Bosworth*, 77 Wis. 660; *Oldham v. Gale*, 1 B. Mon. 76. Granting that proof of the trust is here relevant, evidence of the declarations made by the husband while in possession of the land and cutting down his apparent estate should have been admitted as declarations against proprietary interest. *Queen v. Birmingham*, 1 B. & S. 763.

INSURANCE — OWNERSHIP AND ENCUMBRANCES. — A fire insurance policy on realty contained a condition that it should be void if the interest of the insured became "other than the entire, unconditional, unencumbered and sole ownership." *Held*, that the insured does not forfeit the policy by making a written contract to convey the premises. *Arkansas Fire Ins. Co. v. Wilson*, 55 S. W. Rep. 933 (Ark.).

This decision is difficult to support. A contract to convey would seem to be an encumbrance, since the vendee can obtain specific performance in equity. *Rayner v. Preston*, 18 Ch. D. 1, 6. Some cases however hold, that the word encumbrances, as used in insurance policies, means only mortgages and liens, and not contracts to convey. *Newhall v. Union Mut. Fire Ins. Co.*, 52 Me. 180. Granting that such a contract is not an encumbrance, it is still hard to see, how the vendor in possession can be the entire, unconditional, and sole owner. A vendee in possession has been held to be such an owner. *Dupreau v. Hibernia Ins. Co.*, 76 Mich. 615; *Pelton v. Westchester Fire Ins. Co.*, 77 N. Y. 605. It has also been held that a vendor out of possession is not such an owner. *Clay Ins. Co. v. Huron Manuf. Co.*, 31 Mich. 346. The principal case can only be reconciled logically with these decisions, by saying that, in an insurance policy, entire, unconditional and sole ownership means nothing but rightful possession. This seems to carry to an unjustifiable extreme the doctrine that such contracts are to be construed most strongly against the insurers. *McAllister v. New Eng., etc. Ins. Co.*, 101 Mass. 588, 591.

PROPERTY — ADMINISTRATOR — BAILMENT AT WILL. — A father intrusted certain personal property to his daughter to be used for their mutual benefit. After her death her husband converted the property. Letters of administration were subsequently granted to the plaintiff, who brought replevin for the goods. *Held*, that the administrator cannot maintain the action, because the daughter's death terminated the bailment and the father alone has the right of possession. *Salter v. Sutherland*, 81 N. W. R. 1070 (Mich.).

For many purposes the possession of an administrator relates back to the death of the intestate. Thus he may maintain trespass for a taking of the intestate's property between the death of the latter and the grant of letters of administration. *Brackett v. Hoitt*, 20 N. H. 257. It is hard to see why this principle should not be applied in the present case. The death of the bailee at will clearly terminated the permission to use the property, and the bailor had the right to reclaim it immediately. But since he had not done so, the administrator may be regarded as having been in possession at the time of the conversion. Hence, he had the rights of a bailee at will, including the right of possession as against everyone except the bailor. This view was taken in a very similar case in which trover was allowed. *Fyson v. Chambers* 9 M. & W. 460. On the same principle that trover would lie, replevin should have been allowed in the present case, since there is no good reason for distinguishing the two causes of action. *Y. B. 21 Hen. VII. 14 B*; *Shaw v. Kaler*, 106 Mass. 443 (*semble*). *Contra*, *Harrison v. McIntosh*, 1 Johns. 380 (*semble*).

PROPERTY — ADVERSE POSSESSION — WIDOW'S QUARANTINE. — Land was sold to the plaintiff under execution without a release of dower by the execution debtor's wife. The debtor, however, remained on the land, and on his death his wife continued in possession with her children for the statutory period. After her death the plaintiff brought ejectment against the children. *Held*, that the possession of the widow, being under her statutory right of quarantine, was not adverse to the true owner's title. *Robinson v. Allison*, 27 So. Rep. 461 (Ala.). See NOTES.

PROPERTY — CONFUSION — DAMAGES. — The plaintiff was employed to print 5000 pamphlets from drawings furnished by the defendant. He printed 5080, intending to

keep so for himself. By mistake they were all delivered to the defendant, who refused to return any. *Held*, that the plaintiff cannot recover for their conversion. *Lerveyau v. Clements*, 56 N. E. Rep. 735 (Mass.).

The court proceeds on the ground, that one, who fraudulently mixes his property with that of another, will lose what he put into the mixture, unless he can distinguish it specifically. This rule has been laid down in many cases. *Ward v. Ayre*, Cro. Jac. 369; *Ryder v. Hathaway*, 38 Mass. 298. But it is open to the objection that it awards the innocent party redress beyond his loss, and exacts, not only damages, but a penalty, from the wrongdoer. Probably the better view is, that when there has been no change of value, and the mass is homogeneous, each party is entitled to his proportionate share, irrespective of fraud. *Claffin v. Continental Jersey Works*, 85 Ga. 27, 46; *Hesseltine v. Stockwell*, 30 Me. 237. The result of the principal case is, however, correct, for the plaintiff had no right to print the extra pamphlets, and could have been enjoined from using them. *Tuck v. Priester*, 19 Q. B. D. 629. He suffered, therefore, no damage by their loss, and should recover nothing.

PROPERTY — RELETTING — SURRENDER. — The defendant abandoned premises which he had rented from the plaintiff, and returned the keys. The plaintiff sent them back with a letter refusing to accept the surrender, but notifying the defendant that he would relet the premises and hold him for the difference in rent. The defendant made no reply to this letter, and the plaintiff relet the premises. *Held*, that these facts show a surrender by operation of law, and, therefore, the defendant is not liable for the difference. *Gray v. Kaufman, etc. Co.*, 56 N. E. Rep. 903 (N. Y.).

Although doubted in *Lyon v. Reed*, 13 M. & W. 285, it is now settled that the granting of a new lease with the consent of the old tenant operates as a surrender by operation of law and is not, therefore, within the statute of frauds. *Nickells v. Atherstone*, 10 Q. B. 944; *Amory v. Kannoffsky*, 117 Mass. 351. But where the landlord expressly disclaims any acceptance of the surrender it has been held that this rule does not apply. *Aver v. Penn*, 99 Pa. St. 370; *Underhill v. Collins*, 132 N. Y. 271. The court distinguishing the principal case on the ground that it does not appear that the defendant ever consented to have the premises relet on his account. It may be doubted if this distinction is sound. The right of the landlord to relet should not depend upon the tenant's assent, but should be rested on broader principles of policy. It is obviously unjust that the landlord should be compelled to see his property deteriorate in value for lack of occupancy. Nor should he be compelled in such a case to remain inactive and run the risk of the tenant's insolvency on penalty of losing all his rights against the tenant. Moreover, since a release lessens the damages the tenant is liable for, he can have no valid cause for complaint. *Wood, Land & T.*, 2d ed., 176.

PROPERTY — SPECIFIC PERFORMANCE — DEFECT OF TITLE. — The defendant who was in possession of land under a contract of sale from the plaintiff bought in an outstanding tax title, and then refused to carry out the contract. *Held*, that the plaintiff is entitled to specific performance. *Curran v. Banks*, 82 N. W. Rep. 247 (Mich.).

The court treat this case as governed by the rule that a tenant cannot dispute his landlord's title. In that case, an estoppel is raised on the ground that the tenant has agreed to pay rent in return for the possession of the land, and a defect in his landlord's title is no excuse for his refusal to pay. *Ingraham v. Baldwin*, 9 N. Y. 45. No such reasoning will apply to the present case, for the purchaser of land bargains for a good title, and if a bad one is offered him he has an equitable defence. *Phillip v. Fielding*, 2 H. Bl. 123. The result of the case is, however, thoroughly sound, for the vendor is entitled to a reasonable time to perfect his title upon notice of its defect, and, if the vendee anticipates him, a court of equity should not allow this sharp practice to be set up in defence to a suit for specific performance. *Murrell v. Goodyear*, 1 De G. F. & J. 432.

PROPERTY — TIDAL WATERS — POLLUTION. — The defendant was authorized by statute to empty its sewage into a river. Riparian owners above and below tide waters joined to recover damages. *Held*, that only those above tide water may recover, since the foreshore of tidal streams is owned by the state. *Simmons v. Mayor of Paterson*, 45 Atl. Rep. 995 (N. J., C. A.).

In accord with this case, many courts hold that land owners along tidal streams have no private riparian rights of which the state, as owner of the foreshore, may not deprive them at will. *Gould v. Hudson River R. R. Co.*, 6 N. Y. 522; *Stevens v. Paterson, etc. R. R. Co.*, 34 N. J. Law, 532. But there is at least equal authority for the opposite view. *Lyon v. Fishmonger's Co.*, L. R. 1 App. Cas. 662; *Bowman's Devises v. Wathen*, 2 McLean, 376. Since riparian rights are merely incorporeal rights in the nature of easements appurtenant to the riparian land, there is nothing inconsistent in holding

that the state, though it owns the foreshore, owns it subject to such rights. Moreover, the basis of these rights, that the land is in justice entitled to the natural advantages of its position on the stream, applies with equal force whether the land borders on fresh or tidal waters. It seems, therefore, that the decisions opposed to the principal case reach a more sound result.

SALES — ASSIGNMENT OF BILL OF LADING — PRIVACY OF CONTRACT. — The vendor of goods stipulated to be of a certain quality, shipped them to the plaintiff, taking a bill of lading to his own order, which together with a draft on the vendee he assigned for value. The plaintiff paid the draft on receipt of the goods. *Held*, that the assignee became the owner of the goods and took the shipper's contract, and is therefore liable for defects in the goods. *Finch v. Gregg*, 35 S. E. Rep. 251 (N. C.).

If the shipper of goods in conformity with a contract of sale, takes a bill of lading to his own order, he retains the legal title only as security, the equitable title vesting in the purchaser, who bears the risk of loss. *Mirabite v. Imperial Ottoman Bank*, L. R. 3 Ex. D. 164; *Browne v. Hare*, 4 H. & N. 822. If, however, the goods do not conform to the contract, the entire property remains in the shipper, and passes to the purchaser only on his acceptance of the goods. *Barton v. Kane*, 17 Wis. 37. But in either case, the assignee of the bill of lading and accompanying draft holds the shipper's title only as security for his loan, acquiring substantially the rights of a mortgagee. Therefore, his only interest in the transaction is discharged by the payment of the draft. There is no privity between him and the purchaser, and he cannot be held, as in the principal case, except on the untenable ground that the contract runs with the bill of lading like a covenant running with the land. The only parallel case, which has been found, however, reaches the same anomalous result. *Landa v. Lattin*, 19 Tex. Civ. App. 246.

SALES — AVOIDANCE OF CONTRACT — INNOCENT MISREPRESENTATIONS. — The plaintiff sold goods to the defendant under material representations of the latter, false in fact but made in good faith. *Held*, that the plaintiff may treat the contract as void and maintain replevin for the goods. *Kirschbaum v. Jasspon*, 82 N. W. Rep. 69 (Mich.).

Formerly at common law, in order to avoid a contract, except where the misrepresentation was such as to cause a failure of the consideration, it was necessary to show such actual fraud as would ground an action for deceit. *Kennedy v. Panama Mail Company*, L. R. 2 Q. B. 580, 587. But in equity an innocent material misrepresentation inducing the contract is sufficient, either on the ground that one ought not to get the benefit of what he now admits to be false, or that it is actual moral fraud to insist on the enforcement of a contract known to have been obtained by a falsehood. *Redgrave v. Hurd*, 20 Ch. D. 1; *Daniel v. Mitchell*, 1 Story, 172; Benjamin, Sales, 4th ed., 446. With the introduction of equitable pleas into courts of law, the equitable rule is now properly applied at law, and thus the principal case is clearly right. *Hunt v. Moore*, 2 Pa. St. 105. The authorities to the contrary are ill-considered and of little weight. *Walker v. Hough*, 59 Ill. 375; *Faver Bower*, 33 S. W. Rep. 131 (Tex.).

TORTS — IMPUTED NEGLIGENCE — BAILOR AND BAILEE. — A mule belonging to the plaintiff was injured by the concurring negligence of one who had borrowed it and the defendant. *Held*, that the bailee's negligence can be imputed to the plaintiff, and bars his recovery. *Illinois Cent. R. R. Co. v. Sims*, 27 So. Rep. 527 (Miss.). See NOTES.

TORTS — NEGLIGENCE — TRESPASSERS ON RAILROAD TRACK. — *Held*, that railroad employees, operating a train, are under no duty to look for trespassers on the track. *Cleveland, etc. Ry. Co. v. Tarth*, 99 Fed. Rep. 369 (C. C. A., Seventh Cir.). See NOTES.

TRUSTS — MORTGAGES — ATTORNEY'S FEES. — A trust mortgage deed provided that in case of sale an attorney's fee of five per cent. should be paid out of the proceeds. *Held*, that such provision was against public policy and void, and therefore the trustee could not pay the fee though it was reasonable. *Turner v. Beger*, 35 S. E. Rep. 592 (N. C.).

The objections which the court find to the present provision are that it is an agreement for a penalty, tends to the oppression of the debtor, and affords a cover for usury. On these grounds, similar provisions in promissory notes have sometimes been held void. *Booser v. Anderson*, 42 Ark. 167; *Witherspoon v. Musselman*, 14 Bush, 214. But the better opinion and the weight of authority is that such a stipulation providing merely for the reimbursement of expenses which the default of the debtor has rendered necessary, is valid and enforceable, unless it is shown affirmatively that it was intended as a penalty or evasion of the usury laws. *Barton v. Farmer's Nat. Bank*, 122 Ill. 352; *Bank of Commerce v. Fuqua*, 11 Mont. 285, 297. The amount fixed by the

stipulation should not be conclusive, and only expenses actually and reasonably incurred should be allowed. *Campbell v. Worman*, 58 Minn. 561. As five per cent. was here conceded to be a reasonable charge and as nothing was shown to impeach the good faith of the stipulation, the decision declaring it void seems erroneous and unjust.

REVIEWS.

THE CIVIL LAW IN SPAIN AND SPANISH AMERICA. By Clifford Stevens Walton. Washington. 1900. pp. xix, 672.

This is a timely and useful book. In the first part is given a short but sufficient statement of the Spanish Codes which preceded the present law; the second part is a translation of the Spanish Civil Code of 1833, with parallel references to the South and Central American Codes; the third part is a rather meagre description of the other Spanish Codes, a translation of the Mexican Constitution, and a collection of proclamations affecting the present law of Cuba and Puerto Rico. The value of the book lies in the translation of the Civil Code, which was extended to the colonies, and is therefore the basis of the law in our newest territory. The translation is unfortunately not always commendable: hispanicisms remain to obscure the sense, and *per contra* certain terms of our own law are misapplied to unlike Spanish ideas. On the whole, however, we get from this book an adequate knowledge of part of the Spanish law. The Civil Code, as it contains the Law of Persons, the Law of Property, and the Law of Obligations, is the most interesting and perhaps the most useful of all the Codes. A translation of the Commercial Code also is sadly needed; but the Penal Code and the Codes of Procedure we can spare. It is likely that the Penal Code in Puerto Rico and the Philippines will disappear as it did in Louisiana and Texas, to be replaced bodily by the Common Law.

One of the most interesting features, to us, of the Spanish and other European laws is the doctrine of the civil status (*état civil, statutum personale*). The conception of a natural person whose power of legal action is a gift, not of God, but of his sovereign through the law, is foreign to the English and American mind; but it is the very foundation of the modern Civil Law. Great pains are therefore taken in this Code to secure publicity of knowledge as to civil status; a man's marriage, his sanity, his age, his legitimacy (by nature or by law), and even his presence ready to do business, may be discovered by consulting the proper "registry of civil status," just as his title to real estate may be examined at the registry of property. As is natural, this conception of legal power leads to the doctrine that capacity to act depends upon the law of a man's country.

Marital property also presents to an American lawyer a novel and interesting condition; although it is the foundation of the "community" system which prevails in the larger part of our trans-Mississippi country. As this system is worked out in Spain (and in substantially the same way in the other civil-law countries), the spouses become partners, sharing equally in the earnings and the profits of their common life. As capital the wife brings in her *dot*, the husband such portion of his property as may be agreed upon; the balance of the wife's property (her *parapherna*) remains her separate estate. All property falling to the

spouses during the marriage is treated as profits belonging to the community, unless it is a gift to the separate use of one partner. The husband administers the property so long as the community lasts, unless he has been legally declared an absentee or put under interdiction. The community property is subject to all debts of the spouses during marriage (with unimportant exceptions), but not to preëxisting debts. In some cases the court has power to decree a "separation of goods," a dissolution of the marital copartnership in the property, whereupon each spouse holds his own share of the property in severalty.

The method of testate or intestate succession and of administering estates is also worth study. A man's wife and children (including recognized illegitimate children) have certain rights in his property (their *legitim*) of which he cannot deprive them by a will; and the sum of these rights ties up a very considerable part of his estate. The balance may be disposed by will. One object of the law is to secure the validity of a will both against forgers and against undue influence. Wills are of three kinds. The *holographic* will, written entirely by the hand of the testator, must be written on stamped and dated official paper. The open will must be attested by the testator before a notary, and its contents made public. The secret will must be sealed by the testator within a cover, attested before a notary, and left sealed with the notary. In the case of a testator who might be suspected of insanity, provision is made for proof of his sanity at the time of the attestation of his will. Some of these provisions might be pondered by our legislators. The administration of an estate and the guardianship of an infant are, on the other hand, less carefully looked after by the Spanish courts than by ours; the guardian is kept to his duty, not by the court, but by a *protutor*, appointed from another branch of the family, with the duty of overseeing the guardian's accounts. These officers are nominated by the "family council," a semi-official body with which we are partly familiar in literature.

The proportionate importance of different parts of the law may strike us as singular. To the law of torts, for instance ("obligations arising from fault or negligence"), nine sections are devoted out of about two thousand; the same space devoted to the law of application of payments, and about a quarter of the space devoted to prescription. It is to be said, however, that a large part of our law of torts is dealt with in the Penal Code.

J. H. B.

A TREATISE ON THE LAW OF EVIDENCE. By Simon Greenleaf. Volumes II. and III. Sixteenth Edition. By Edward Avery Harriman. Boston: Little, Brown & Co. 1899. pp. xcv, 638; xliii, 542.

Volume I. of Greenleaf on Evidence expounds and discusses the law of evidence; volumes II. and III. are cyclopædias of reference as to what evidence is necessary in the trial of various actions at law. The sixteenth edition of volume I., by Professor Wigmore, succeeded admirably, it seems, in rejuvenating the learning of Greenleaf and in revising and clarifying the principles of evidence. The work of Professor Harriman, in editing the sixteenth edition of volumes II. and III., was merely to bring those cyclopædias of reference up to date by the addition of the recent authorities and the noting of recent alterations of the law — the usual work of an editor — less ambitious and less laborious than the work on volume I., but a necessary complement to it. As far as one may judge of a cyclopædia of law cases without the practical use of it, the work

seems well done. Mr. Harriman seems to have gone over the whole field with care, and, on most of the points, to have added some authorities. The work has been merely that of supplementing the original lists of cases with authorities culled from the subsequent digests, but the selection and arrangement of these authorities is adequate. The new notes are very slight, and only some two or three thousand cases are added — but the amount of additions seem to justify the reëdition. The text of volumes II. and III. of Greenleaf contains a great mass of general legal information, but — unlike the text of volume I. — it has no peculiar significance as epoch making in the law. In view of that fact, one regrets that Mr. Harriman took so few liberties with it.

J. P. C., JR.

We have also received : —

RAILWAY CONTROL BY COMMISSIONS. By Frank Hendrick. New York and London : G. P. Putnam's Sons. 1900. pp. 160. The first chapters comprise an accurate and concise account of the history of railway development and regulation in the countries of continental Europe. It, however, amounts to little more than a digest of similar sections in earlier texts on the same subject, and was apparently undertaken without any prolonged investigation of the original sources of information. What may be called the latter half of the text deals more directly with the control by commissions as we know them. It contains an historical sketch of the genesis of the present English and American systems. The author's conclusions are clearly and accurately stated. It is his opinion that a commission, in order to best control the railroad interests in America, should be modelled not after the English type, but after that of Massachusetts. It should be advisory rather than executive. It should control, not by force of powers granted it by the legislature, but by means of the enlightened public opinion which it will call into existence. In advocating the Massachusetts system for all democratic governments, the author forgets that the efficiency of this system was due to a great extent to its brilliant personnel and the fact that the conditions under which it worked were largely peculiar to Massachusetts. Therefore this plan is not fully assured of an equal success if it be put in practice in other states. From the unfortunate result of our present federal system, the author argues that all commissions "with power" will be inefficient. He apparently overlooks the fact that this failure may be due to a lack of greater power rather than to the greatness of the power it at present possesses. However, the writer's view is undoubtedly tenable, and it may be that the method of control suggested, though it now appears somewhat visionary, will in the future work out the best results.

CONTRACTS, Extracts, Citations, Condensed Cases, Cases and Statements. Prepared for the use of Students in the Law School of the University of New York. By Clarence D. Ashley. Second Edition. New York : L. D. Tompkins. 1899. pp. 360. This volume is virtually a short cut to a knowledge of the law of contracts, and very rarely can such a short cut be considered successful. A full report of some fifty actual decisions, a liberal condensation of the facts of as many more, and numerous supposititious examples, together with other brief extracts of various sorts, serve to make up the body of the text. The book may

serve to fulfil the purpose for which it was written, to meet the needs of the author's own classes, but it is doubtful whether it will be very helpful generally. It is more of a case book, perhaps, than anything else; yet, by reason of its great condensation, it furnishes but a scant basis for that practice in legal reasoning which is the chief glory of the case system. Nevertheless, what few cases Mr. Ashley has printed in full are well selected. For example, under the title of third persons as beneficiaries are given the three leading cases of *Dutton v. Poole*, *Lawrence v. Fox*, and *Buchanan v. Tilden*. Likewise his condensations and practice examples are well chosen. They present much that is suggestive to one who is already conversant with the principles of the law of contracts. To be useful as an aid to the first study of the subject, however, the book would apparently need to be liberally supplemented in the lecture room by elaborate explanations on the part of the instructor.

HAMILTON'S NEW YORK NEGLIGENCE CASES CLASSIFIED. 1899 Annual. A complete Collection of all Reported Negligence Cases Decided by all the New York State Courts from Jan. 1, 1899, to Jan. 1, 1900. Edited by T. F. Hamilton of the New York Bar. Albany, N. Y.: Matthew Bender. 1900. pp. xi, 179. This is the second supplement to Hamilton's New York Negligence Cases, Classified, and brings the work up to date. The cases are arranged according to the facts, which are very fully given. There is appended a table of cases, but there is no index of the points of law involved. Even a brief index of these would probably have greatly increased the value of the book to the practicing lawyer. Notwithstanding what seems to be a defect, the book bears evidence of careful preparation and is likely to prove useful. It certainly has a legitimate place among legal publications.

THE RIGHTS, DUTIES, REMEDIES, AND INCIDENTS BELONGING TO AND GROWING OUT OF THE RELATION OF LANDLORD AND TENANT. By David McAdam. In two volumes. Vol. I. Third Edition. New York: Remick Schilling & Co. 1900. pp. xiii, 856. *Review will follow.*

JOURNAL OF THE SOCIETY OF COMPARATIVE LEGISLATION. Edited for the Society by John Macdonnell and Edward Manson. New Series. 1900. No. 1. London: John Murray. 1900. pp. 192.

REPUBLIC OR EMPIRE? — An Argument in Opposition to the Establishment of an American Colonial System. By James W. Stillman. Boston: George E. Ellis. 1900. pp. 30.

THE LAW OF ELECTRIC WIRES IN STREETS AND HIGHWAYS. By Edward Quinton Keasbey. Second Edition. Chicago: Callaghan & Co. 1900. pp. xliv, 358. *Review will follow.*

NOTICE AS TO THE DEGREE OF B.C.L. AT OXFORD.

THE appended extract marks an epoch in the history of the great English universities. Until the present time, the Universities of Oxford and Cambridge have not regularly given the more advanced degrees to any but their own graduates. Now, at Oxford, by virtue of this new provision, the law degree is not confined to persons holding the Oxford B.A. It is largely through the efforts of Professor Dicey that this change has been brought about. And to him we are indebted for the following:—

UNIVERSITY OF OXFORD.

Degrees of B.C.L. and D.C.L.

Extract from the Statute rendering the Degrees of B.C.L. and D.C.L. accessible to persons who, having obtained a Degree in Arts in other Universities, shall study Law in this University, although they have not been admitted to the Degree of B.A.

"2. Any person may supplicate for the Degree of Bachelor of Civil Law, although he has not been admitted to the Degree of Bachelor of Arts, provided that:—

(1) Having attained the age of 21 years, and having obtained a Degree in Arts in some other University, he shall have satisfied the Board of the Faculty of Law of these facts, and also that, having received a good general education, he is well qualified to pursue an advanced course of legal study at Oxford.

(2) After receiving from the Secretary to the Boards of Faculties a notification that he has satisfied the Board of the Faculty of Law, as aforesaid, he shall have been matriculated.

(3) After being so matriculated, he shall have kept statutable residence for eight Terms, and during that time shall have occupied himself in hearing lectures or otherwise in the study of Law, under the supervision and to the satisfaction of the Board.

(4) Having, with the permission of the Board, not earlier than the eighth, nor later than the twelfth, Term from his matriculation, entered for the examination for the Degree of Bachelor of Civil Law, he shall have obtained Honours in the same.

3. The Board of the Faculty of Law and, subject to the approval of the Vice-Chancellor, the Secretary to the Boards of Faculties, shall have power to make and vary such regulations, having regard to their respective duties, as may be necessary for carrying out the provisions of the foregoing clause."

OXFORD, May 8, 1900.

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A HUNDRED YEARS OF AMERICAN DIPLOMACY.¹

SOMEWHAT less than a century and a quarter ago the representatives of the United States of America, assembled in General Congress at the city of Philadelphia, declared that the thirteen United Colonies, possessed, as free and independent States, "full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which Independent States may of right do." The period that has since elapsed, measured by the general duration of national life, is comparatively brief; but its importance is not to be estimated by length of years. The United States came into being, as an independent nation, on the eve of great mutations in the world's political and moral order. The principles on which the government was founded were indeed not new; they had been proclaimed by philosophers in other times and in other lands; but they found here a congenial and unpre-occupied soil and an opportunity to grow. The theories of philosophers became in America the practice of statesmen. The rights of man became the rights of men. But the new nation, though conceived in liberty and dedicated to freedom, was practical in its aims and judicious in its methods. It also recognized the right to life, liberty, and the pursuit of happiness as belonging to men not only as individuals, but also in their aggregate political capacity as

¹ An address delivered before the American Bar Association at Saratoga Springs, August 30, 1900.

independent nations. Adopting therefore as its rule non-intervention, it declined the proposal of the revolutionary government in France, in 1793, for "a national agreement, in which two great peoples shall suspend their commercial and political interests, and establish a mutual understanding to defend the empire of liberty, wherever it can be embraced."¹ Abstaining from active political propagandism, and acknowledging the right of other nations to work out their destiny in their own way, but confident of the beneficence and ultimate triumph of its own principles, it escaped the turmoils as well as the reactions that come of excessive and unregulated zeal, and, by the example of order and prosperity at home and the pursuit of an enlightened and consistent policy abroad, continued to uphold the cause of free government, free commerce, and free seas. And it is in the maintenance of this great cause, in its various phases, that the United States has made its distinctive contribution to diplomacy.

Although we are particularly concerned on the present occasion with the achievements of the century now drawing to a close, it will be necessary, in order to avoid an abrupt and misleading breach in the actual continuity of events, to recur at times to the acts of the great men who endowed our government with its original form and purpose. At the very outset they looked abroad with a view to enter into relations with other governments. Four months before the Declaration of Independence, an agent was sent to France by the Continental Congress with suitable instructions, perhaps not the least onerous of which was the injunction to acquire "Parisian French."² Six months later the Congress adopted a plan of a treaty.³ Comprehensive in scope and far-reaching in its aims, this remarkable state paper stands as a monument to the broad and sagacious views of the men who framed it and gave it their sanction. Many of its provisions have found their way, often in identical terms, into the subsequent treaties of the United States; while, in its proposals for the abolition of discriminating duties that favored the native in matters of commerce and navigation, it levelled a blow at the exclusive system

¹ Am. State Papers, For. Rel. i. 708.

² The agent was Silas Deane. His instructions, bearing date March 3, 1776, were signed by B. Franklin, Benj. Harrison, John Dickinson, Robert Morris, and John Jay, of the Committee of Secret Correspondence. The objects of his mission were to obtain military supplies and to prepare the way, in case independence should be declared, for the conclusion of a treaty. *Dip. Cor. Am. Rev.*, Wharton's edition, ii. 78.

³ *Secret Journals of Congress*, ii. 6-25.

then prevailing, and anticipated by forty years the first successful effort to incorporate into a treaty the principle of equality and freedom, on which those proposals were based.¹

Prior to 1789, the United States entered into fourteen treaties. Six of the fourteen were with France, but a majority of all were negotiated and signed in that country, at Paris or Versailles. Eight were subscribed, on the part of the United States, by two or more plenipotentiaries; and among their names we find, either alone or in association, that of Franklin, ten times; the name of Adams, seven times; the name of Jefferson, three times; and that of Jay, who shared with Adams and Franklin the burden of the peace negotiations with Great Britain, twice. These early treaties covered a wide range of subjects, embracing not only war and peace, but also political alliance, pecuniary loans, commercial intercourse, and the rights of consuls.² Among their various stipulations, we may find provisions for liberty of conscience,³ for the abolition of the *droit d'aubaine* and *droit détraction*, and for the removal, generally, of the disability of the alien to dispose of his goods and effects, movable or even immovable, by testament, donation, or otherwise.⁴ In one instance, it is agreed that, if differences shall arise in consequence of an infraction of the treaty, no appeal shall be made to arms till a friendly arrangement shall have been proposed and rejected.⁵ Stipulations for the mitigation of the evils of war are numerous. A fixed time is allowed, in the unfortunate event of hostilities, for the sale or withdrawal of goods;⁶ pro-

¹ See Notes upon the Foreign Treaties of the United States, by J. C. Bancroft Davis, Treaty Volume, 1776-1837, pp. 1219, 1220; and the treaty of commerce and navigation with Great Britain, concluded Dec. 22, 1815.

² The treaties and conventions prior to 1789, grouped under the countries with which they were concluded, were: France: Amity and Commerce, February 6, 1778; Alliance, February 6, 1778; Separate and Secret Act reserving to the King of Spain the right to accede to the Alliance, February 6, 1778; Contract for the Payment of Loans, July 16, 1782; Contract for a New Loan and the Payment of Old Ones, February 25, 1783; Consular Convention, November 14, 1788. Great Britain: Provisional Articles of Peace, November 30, 1782; Armistice, January 20, 1783; Definitive Treaty of Peace, September 3, 1783. Morocco: Peace and Friendship, January, 1787. The Netherlands: Amity and Commerce, October 8, 1782; Convention concerning Recaptures, October 8, 1782. Prussia: Amity and Commerce, September 10, 1785. Sweden: Amity and Commerce, April 3, 1783.

³ Netherlands, 1782, Art. IV.; Prussia, 1785, Art. XI.; Sweden, 1783, Art. V.

⁴ France, Amity and Commerce, 1778, Art. XI.; Netherlands, 1782, Art. VI.; Prussia, 1785, Art. X.; Sweden, 1783, Art. VI.

⁵ Morocco, 1787, Art. XXIV.

⁶ France, Amity and Commerce, 1778, Art. XX.; Morocco, 1787, Art. XXIV.; Netherlands, 1782, Art. XVIII.; Prussia, 1785, Art. XXIII.; Sweden, 1783, Art. XXII.

vision is made for the humane treatment of prisoners of war;¹ the exercise of visit and search at sea is regulated and restrained;² the acceptance by a citizen of the one country of a privateering commission against the inhabitants of the other or their property, when the two contracting parties are at peace, is made piracy;³ and not only is contraband carefully defined, sometimes both positively and negatively, so as to limit its scope,⁴ but in the treaty with Prussia it is declared that no articles, not even arms and munitions of war, shall "be deemed contraband, so as to induce confiscation or condemnation and a loss of property to individuals," but that, if captured and taken, they shall be paid for at their full value, "according to the current price at the place of destination," while, if they are merely detained, compensation must be made for the loss thereby occasioned.⁵ In the same treaty there stood another clause, exempting all merchant and trading vessels from molestation in time of war.⁶ These clauses were far in advance of the international law of the time. They represented an aspiration; but, if intended also as a prophecy, they yet remain for the most part unverified and unfulfilled, though they are by no means discredited.

There is yet another thing for which we are indebted in no small measure to the men who laid the foundations of our system, and that is a certain simplicity and directness in the conduct of negotiations. Observant of the proprieties and courtesies of intercourse, but having, as John Adams once declared, "no notion of cheating anybody," they relied rather upon the strength of their cause, frankly and clearly argued, than upon a subtle diplomacy for the attainment of their ends. Nor did the framework of government subsequently adopted by them admit of the practice of secrecy and reserve, such as characterized the personal diplomacy of monarchs whose tenure was for life, and who were unvexed by popular electorates and representative assemblies. Hence, as it was in the beginning, so American diplomacy has in the main continued to

¹ Prussia, 1785, Art. XXIV.

² France, Amity and Commerce, 1778, Arts. XIII., XXVII.; Morocco, 1787, Arts. V., XII.; Netherlands, 1782, Art. XI.; Prussia, 1785, Art. XV.; Sweden, 1783, Arts. XIII., XXV.

³ France, Amity and Commerce, 1778, Art. XXI.; Netherlands, 1782, Art. XIX.; Prussia, 1785, Art. XX.; Sweden, 1783, Art. XXIII.

⁴ France, Amity and Commerce, 1778, Art. XXIV.; Netherlands, 1782, Art. XXIV.; Sweden, 1783, Arts. IX., X.

⁵ Art. XIII.

⁶ Art. XXIII.

be, a simple, direct, and open diplomacy, the example of which has exercised a potent influence on the development of modern methods.

Soon after the organization of permanent government under the Constitution, it became necessary to act upon two questions of foreign policy of more than ordinary importance. The first was that of recognizing the republic proclaimed in France by the National Convention. The position of the United States on this question was defined by Mr. Jefferson, as Secretary of State, in an instruction which has often been cited.¹ "When principles are well understood," said Mr. Jefferson, "their application is less embarrassing. We surely cannot deny to any nation that right whereon our own government is founded, that every one may govern itself according to whatever form it pleases, and change these forms at its own will; and that it may transact its business with foreign nations through whatever organ it thinks proper, whether king, convention, assembly, committee, president, or anything else it may choose. The will of the nation is the only thing essential to be regarded." In a word, the United States maintained that the true test of a government's title to recognition is not the theoretical legitimacy of its origin, but the mere fact of its existence as the apparent exponent of the popular will. This principle, though it necessarily found little support in Europe in 1793, has proved to be of the highest practical value; for not only has it continued to guide the course of the United States, but it has also become the generally accepted rule of international conduct.

The other great question to which we have adverted was that of the course which the United States should pursue in the first general European war, growing out of the French Revolution. In an early stage of that conflict, the government, after grave deliberation, resolved to preserve a neutral position.² With this decision there began the great struggle concerning neutrality, whose concluding chapter may be found only in the Treaty of Washington of 1871 and the arbitration at Geneva. The determination to be neutral involved both the maintenance of rights and the performance of duties; but neither the rights nor the duties of neutrality had ever been clearly and comprehensively defined. While publi-

¹ Mr. Jefferson, Sec. of State, to Gouverneur Morris, Minister to France, March 12, 1793, Ford's Writings of Thomas Jefferson, vi. 199.

² Washington's neutrality proclamation of April 22, 1793, and its history may be found in Moore, *International Arbitrations*, iv. 3968; v. 4406 *et seq.* This work will hereafter be cited as "*International Arbitrations*."

cists had laid down on the subject, with more or less doubt and hesitation, certain general principles, the practice of governments had been fitful and uncertain, and there existed no recognized standard of neutral obligations. The establishment of such a standard fell to the lot of the United States. Writing on June 5, 1793, to M. Genet, the French minister, who had, on his arrival in the United States, issued commissions to American citizens under which privateers were fitted out to prey on English commerce, Mr. Jefferson, as Secretary of State, declared that it was "the *right* of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the *duty* of a neutral nation to prohibit such as would injure one of the warring powers;" that "the granting military commissions, within the United States, by any other authority than their own," was "an infringement on their sovereignty, and particularly so when granted to their own citizens, to lead them to commit acts contrary to the duties they owe their own country;" and that "the departure of vessels, thus illegally equipped, from the ports of the United States," would be but an act of respect and was required as an evidence of neutrality.¹ Somewhat later Mr. Jefferson informed M. Genet, that the President considered the United States "as bound, . . . in conformity to the laws of neutrality, to effectuate the restoration of, or to make compensation for, prizes which shall have been made of any of the parties at war with France subsequent to the 5th day of June last by privateers fitted out of our ports;" that it was consequently expected that he would "cause restitution to be made, of all prizes so taken and brought in subsequent to that day, in defect of which the President would consider it incumbent upon the United States "to indemnify the owners of those prizes, the indemnification to be reimbursed by the French nation;" and that, "besides taking efficacious measures to prevent the future fitting out of privateers in the ports of the United States, they will not give asylum therein to any which shall have been at any time so fitted out, and will cause restitution of all such prizes as shall hereafter be brought within their ports by any of the said privateers."² These declarations were amplified in a note to the British minister;³ and still later, in an instruction to Mr. Morris, then United States minister to France, Mr. Jefferson further

¹ Am. State Papers, For. Rel. i. 150; International Arbitrations, i. 312.

² Am. State Papers, For. Rel. i. 167; International Arbitrations, i. 313.

³ Mr. Jefferson to Mr. Hammond, Sept. 7, 1793, Am. State Papers, For. Rel. i. 174; International Arbitrations, i. 314.

declared "that a neutral nation must, in all things relating to the war, observe an exact impartiality towards the parties; that favors to one to the prejudice of the other would import a fraudulent neutrality, of which no nation would be the dupe; that no succor should be given to either, unless stipulated by treaty, in men, arms, or anything else, directly serving for war; that the raising of troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign power or person can levy men, within its territory, without its consent; . . . that if the United States have a right to refuse permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right, and to prohibit such armaments and enlistments."¹ To insure the enforcement of these views, instructions were issued by Alexander Hamilton, then Secretary of the Treasury, to the collectors of customs;² and Congress passed the first Neutrality Act, which forbade within the United States the acceptance and exercise by a citizen thereof of a commission, the enlistment of men, the fitting out and arming of vessels, the augmenting or increasing the force of armed vessels, and the setting on foot of military expeditions, in the service of any prince or state with which the United States was at peace.³ In due season compensation was made to British subjects, in conformity with the principles previously acknowledged, for injuries inflicted by French privateers in violation of American neutrality.⁴

"The policy of the United States in 1793," says one of the greatest of English writers on international law, "constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinions as to what those obligations were; and in some points it even went further than authoritative international custom has up to the present day advanced. In the main, however, it is identical with the standard of conduct which is now adopted by the community of nations."⁵ But, upon the foundations thus surely laid, there was yet to be reared a superstructure. The act of 1794, which was to remain in force for only

¹ Am. State Papers, For. Rel. i. 168.

² International Arbitrations, iv. 3971.

³ Act of June 5, 1794; Int. Arbitrations, iv. 3978 *et seq.*

⁴ International Arbitrations, i. 343.

⁵ Hall, Int. Law, 4th ed. p. 616.

a limited term, was afterwards extended,¹ and was then continued in force indefinitely.² An additional act was passed in 1817,³ but this, together with all prior legislation on the subject, was repealed and superseded by the comprehensive statute of April 20 1818,⁴ the provisions of which are now embodied in the Revised Statutes.⁵ An act similar in its prohibitions, though less effective in its administrative powers, was passed by the British Parliament in the following year; laws and regulations were from time to time adopted by other governments; and the duties of neutrality became a fixed and determinate part of international law. The supreme test of the system, as the ultimate standard of national obligation and responsibility, was made in the case of the Alabama Claims, and was made successfully. By Article VI. of the treaty between the United States and Great Britain, concluded at Washington, May 8, 1871, for the settlement of those claims, it was agreed that "a neutral government is bound —

"First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

"Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"Thirdly, to exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

The British plenipotentiaries, by command of their government, declared that they assented to these rules as a means of strengthening friendly relations and of making satisfactory provision for the future, and not as a statement of the principles of international

¹ Act of March 2, 1797, 1 Stats. at L. 497.

² Act of April 24, 1800, 2 Stats. at L. 54.

³ Act of March 3, 1817, 3 Stats. at L. 370.

⁴ 3 Stats. at L. 449.

⁵ Revised Statutes of the United States, Title LXVII., sections 5281-5291. The things forbidden by the act of 1818 are summarized in the neutrality proclamation issued by President Grant, Oct. 8, 1870, with reference to the Franco-German War. 16 Stats. at L. 1132.

law which were in force at the time when the claims arose. Into this question it is unnecessary now to enter. At the present day the substance of the rules is uncontested.¹

The struggle of the United States for neutral rights originated in the same great European conflict as the controversy respecting neutral duties. By a decree of the National Convention of May 9, 1793, the commanders of French ships of war and privateers were authorized to seize and bring in merchant vessels which were laden, either wholly or in part with provisions, bound to an enemy's port, or with merchandise belonging to an enemy. The merchandise of an enemy was declared to be "lawful prize," but provisions, if the property of a neutral, were to be paid for, and an allowance was to be made in either case for freight and for the vessel's detention. This decree, which was defended on the ground of a scarcity of provisions in France, ran counter to the views of the United States concerning the freedom of trade in provisions, and, so far as it affected American vessels, to the stipulation in the treaty between the two countries for the freedom of enemy goods on neutral ships. The operation of the decree was at one time declared to be suspended as to American vessels, but it was soon reëstablished, and subsequently other decrees, yet more injurious, were adopted.² Meanwhile, the commanders of British cruisers were authorized to seize and bring in all vessels laden, wholly or in part, with corn, flour, or meal, bound either to a port in France or to a port occupied by the French armies, in order that such corn, flour, or meal might be purchased for the British government and the vessel released with an allowance for freight, or in order that the master might, on giving due security, be allowed to dispose of his cargo in the port of some country in amity with Great Britain.³ This order, as in the case of the French decree, was followed by others yet more obnoxious. Against all these measures the United States protested, both by word and by deed. From Great Britain a large pecuniary indemnity was obtained.⁴ The controversy with France, which involved many irritating questions, culminated in the state of limited war which prevailed from 1798 to 1800.⁵

¹ Rivier *Principes du Droit des Gens*, ii. 408; *International Arbitrations*, i. 670 *et seq.*

² *International Arbitrations*, v. 4412 *et seq.*

³ Order in Council of June 8, 1793, *International Arbitrations*, i. 300 *et seq.* The word "corn," in this order, comprehends cereals generally, as wheat, barley, rye, and oats, and more especially wheat.

⁴ *International Arbitrations*, i. 341-344.

⁵ *International Arbitrations*, v. 4415 *et seq.*

The respite which commerce enjoyed from belligerent depredations after the Peace of Amiens was of brief duration, and the renewal of the war was ere long followed by measures which, though not wholly unprefigured, retain in the history of belligerent pretensions an unhappy preëminence. The British government, in 1806, in retaliation for a decree of Prussia excluding British trade, declared the mouths of the Ems, Weser, Elbe, and Trave to be in a state of blockade. Toward the end of the same year Napoleon declared the British Isles to be in a state of blockade, and all commerce and correspondence with them to be prohibited.¹

Great Britain then issued an order in council forbidding neutral vessels to trade between ports in the control of France or her allies,² and still later another forbidding them to trade, without a clearance obtained in a British port, not only with the ports of France and her allies, but also with any port in Europe from which the British flag was excluded.³ Napoleon's answer was the Milan decree,⁴ by which it was declared that every vessel that had submitted to search by an English ship, or consented to a voyage to England, or paid any tax to the English government, and every vessel that should sail to or from a port in Great Britain or her possessions, or in any country occupied by British troops, should be deemed good prize. These measures, with their bald assertions of paper blockades and sweeping denials of the rights of neutrality, the United States, as practically the only remaining neutral, met with protests, with embargoes, with non-intercourse, and finally, in the case of Great Britain, which was aggravated by the question of impressment, with war,⁵ while from France a considerable indemnity was afterwards obtained by treaty.⁶ The pretensions against which the United States contended are no longer justified on legal grounds. It is now universally admitted that a blockade, in order to be valid, must be actually maintained by a force sufficient to render access to the blockaded place dangerous. The right of neutrals to trade with belligerents is acknowledged, subject only to the law of contraband and of blockade. The claim of impressment is no longer asserted.

With the claim of impressment was associated the question of visitation and search. It is conceded that the merchant vessels of a neutral nation may be visited and searched on the high seas

¹ Berlin Decree, Nov. 21, 1806.

² Order in Council of Jan. 6, 1807.

³ Order in Council of Nov. 11, 1807.

⁴ Dec. 17, 1807.

⁵ International Arbitrations, v. 3447 *et seq.*

⁶ Treaty of July 4, 1831. See International Arbitrations, v. 4460.

in time of war by a belligerent cruiser for the purpose of ascertaining whether they are engaged in violating the laws of war, particularly in relation to contraband and blockade. The United States resisted the perversion of this right to other ends, and denied the existence, apart from treaty, of any right of search in time of peace. In 1858 the Senate unanimously resolved "that American vessels on the high seas, in time of peace, bearing the American flag, remain under the jurisdiction of the country to which they belong, and therefore any visitation, molestation, or detention of such vessels by force, or by the exhibition of force, on the part of a foreign power, is in derogation of the sovereignty of the United States." "After the passage of this resolution," says Mr. Fish, "Great Britain formally recognized the principle thus announced, and other maritime powers, and writers on international law, all assert it."¹

While maintaining the freedom of the seas, the United States has also contended for the free navigation of the natural channels by which they are connected. On this principle it led in the movement that brought about the abolition of the Danish Sound Dues.² An artificial channel necessarily involves special consideration, but, reasoning by analogy, Mr. Clay, as Secretary of State, declared that if a canal to unite the Atlantic and Pacific oceans should ever be constructed, "the benefits of it ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon the payment of a just compensation or reasonable tolls." This principle was approved by the Senate in 1835, and by the House of Representatives in 1839, and was incorporated in the Clayton-Bulwer treaty in 1850. It is also embodied in the pending Hay-Pauncefote treaty. It forms the basis of the treaty concluded at Constantinople in 1888, between the leading maritime powers of Europe, in relation to the Suez Canal.

Nor should we omit to mention, in connection with the freedom of the seas, the subject of the free navigation of international rivers. This principle, consecrated in the acts of the Congress of Vienna,³ has been consistently advocated by the United States,

¹ Foreign Relations of the United States, 1874, p. 963. See, also, Wharton's Int. Law Digest, iii. 122 *et seq.* Exceptional cases, such as that of piracy, or of strictly necessary and emergent self-defence, it is impossible within the limits of the present paper to discuss.

² Int. Law Digest, i. sec. 29.

³ International Arbitrations, v. 4851.

and has been embodied in various forms in several of its treaties.¹ Among these may be cited the treaty of 1853 with the Argentine Confederation, conceding "the free navigation of the rivers Parana and Uruguay . . . to the merchant vessels of all nations;" of 1858 with Bolivia, declaring the Amazon and La Plata, with their tributaries, to be, "in accordance with fixed principles of international law, . . . channels opened by nature for the commerce of all nations;" of 1859 with Paraguay, extending to "the merchant flag of the citizens of the United States" the free navigation of the Paraguay and Parana; and of 1871 with Great Britain, declaring the navigation of the rivers St. Lawrence, Yukon, Porcupine, and Stikine to be "forever free and open for purposes of commerce" to the citizens of both countries.

While the struggle for neutral rights was in progress, the Spanish colonies in America began one after another to declare their independence. In this movement the United States instinctively felt a deep concern; yet the government, adhering to its policy of non-intervention, pursued a neutral course so long as the contest was confined to the original parties. But in time a new situation arose. In the summer of 1823 the continental powers of Europe, composing the Holy Alliance, having intervened to restore absolute government in Spain, gave notice to Great Britain of a design to call a congress with a view to concert measures for putting an end to the revolutionary governments in Spanish America. At this time Lord Castlereagh, who was favorably disposed to the alliance, had been succeeded in the conduct of the foreign affairs of England by George Canning, who reflected the popular opposition to the policy of the allied powers. The United States, acting upon its principle that independence should be acknowledged when it is established as a fact, had then recognized the Spanish-American governments. Great Britain had not taken this step; but English merchants, like those of the United States, had developed with the countries in question a large trade which their restoration to a colonial condition would, under the exclusive system then in vogue, cut off and destroy. Canning therefore lost no time in sounding Mr. Rush, then United States minister at London, as to the possibility of a joint declaration by the two governments

¹ "A river that passes through or washes the territory of two or more states must, in respect to its navigable uses, be considered as common to all the nations who inhabit its banks, as a free gift flowing from the bounty of Heaven, intended for all whose lots are cast upon its borders." Mr. Clay, Sec. of State, to Mr. Gallatin, June 19, 1826, *Am. State Papers, For. Rel.* v. 763.

against the intervention of the allies in Spanish America. When this suggestion was reported, President Monroe hastened to take counsel upon it. The opinions of Jefferson and Madison were strongly expressed and altogether favorable. In the cabinet, Mr. Calhoun, who also urged the importance of action, inclined to invest Mr. Rush with discretionary powers. Mr. John Quincy Adams, however, maintained that, as we had acknowledged the independence of the Spanish-American states, joint action could be taken only on that basis, and that the declarations of the two governments should therefore be made separately. This view prevailed. Canning, in fact, without awaiting the decision of the United States, advised the French Ambassador on the 9th of October, 1823, that while Great Britain would remain "neutral" in any war between Spain and her colonies, the "junction" of any foreign power with Spain against the colonies would be viewed as presenting "entirely a new question," upon which Great Britain "must take such decision" as her interests "might require."¹ The announcement of the United States went further. President Monroe, in his annual message of December 2, 1823, declared that any attempt on the part of the allied powers to extend their system to any portion of this hemisphere would be considered as "dangerous to our peace and safety," and that any interposition by any European power in the affairs of the governments whose independence we had acknowledged, for the purpose of oppressing them or controlling in any other manner their destiny, could be viewed in no other light than as "the manifestation of an unfriendly disposition towards the United States." In the same message there was another declaration, made with reference to territorial disputes on the northwest coast, that "the American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered as subjects for future colonization by any European powers." These declarations, under the name of the Monroe Doctrine, embody a cardinal principle of American diplomacy. As a protest against the political intervention of Europe and the extension of European dominion in this hemisphere, they found a ready lodgment in the hearts of the American people; and, thus interpreted and sustained, they still stand, as on memorable occasions they have stood heretofore, as a guarantee of the independence of governments and the freedom of commerce.

¹ Annual Register, 1824, p. 485.

Mr. Adams, in his meditations on the question of Spanish America, reasoned thus: "Considering the South Americans as independent nations, they themselves, and no other nation, had the *right* to dispose of their condition; *we* have no right to dispose of them, either alone or in conjunction with other nations; neither have any other nations the right of disposing of them without their consent."¹ This principle, coeval with the American Republic, has also been the guide of our policy in the far East. Early on the scene in China, and the first to enter into treaties with Japan and Korea, the United States has steadfastly sought the preservation of their independence and territorial integrity, not only as a thing just and expedient in itself, but also as the logical foundation of the system of trade equality latterly denoted by the phrase "open door." Especially is this true of those populous countries, China and Japan, our interest in which is not lessened by the fact that they have, by our acquisition of the Philippines, become our near neighbors.² Japan, coherent and aspiring, has at length been emancipated. China, disorganized and rent by internal disorders, portions of her territory occupied by foreign powers, and the rest shadowed by spheres of influence, suggests an uncertain future. The United States lately obtained from the powers an engagement to observe throughout the Empire the principle of commercial equality. Its policy in the grave crisis that has since arisen is expressed in the circular issued by the Secretary of State on the 3d of July last. After stating the President's purpose to act concurrently with the other powers, in the immediate protection of American interests and the restoration of order, Mr. Hay in that circular declares that as to the future "the policy of the government of the United States is to seek a solution which may bring about permanent safety and peace to China, preserve Chinese territorial and administrative entity, protect all rights guaranteed to friendly powers by treaty and international law, and safeguard for the world the principle of equal and impartial trade with all parts of the Chinese Empire."

In a sketch of American diplomacy during the past hundred years it is necessary to refer to the attitude of the government on certain questions that specially affect the rights of individuals.

¹ *Memoirs*, vi. 186.

² Our treaty with China of June 18, 1858, provides (Art. I.) that "if any other nation should act unjustly or oppressively, the United States will exert their good offices, on being informed of the case, to bring about an amicable arrangement of the question, thus showing their friendly feelings."

The Declaration of Independence enumerates, as among the "unalienable rights" with which "all men" are "endowed by their Creator," "life, liberty, and the pursuit of happiness." Whether these comprehended, incidentally, the right of the individual to renounce his allegiance at will, is a question on which opinions differed. The courts of the United States, prior to 1868, accepting the doctrine of the common law, generally sustained the negative;¹ and the utterances of the executive department, even down to 1853, were by no means consistent. Mr. Buchanan, however, as Secretary of State, under the administration of Polk, broadly maintained the affirmative; and Mr. Cass in 1859 asserted that "the moment a foreigner becomes naturalized his allegiance to his native country is severed forever. He experiences a new political birth. . . . Should he return to his native country he returns as an American citizen, and in no other character." Congress in 1868 declared "the right of expatriation" to be "a natural and inherent right of all people, indispensable to the enjoyment of the right of life, liberty, and the pursuit of happiness," and pronounced "any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation," to be "inconsistent with the fundamental principles of this government."² Prior to the passage of this act, George Bancroft concluded with the North German Union the first treaty of naturalization.³ He made similar treaties with Baden,⁴ Bavaria,⁵ and Hesse.⁶ Before the end of 1872, treaties on the same subject were entered into with Austria-Hungary,⁷ Belgium,⁸ Denmark,⁹ Ecuador,¹⁰ Great Britain,¹¹ Mexico,¹² and Sweden and Norway.¹³ No treaty has since been added to the list. This fact may be explained not only by an un readiness on the part of various governments to accept a compliance with the naturalization laws of the United States as a sufficient act of expatriation, but also by the exigencies of military service and the numerous cases in which it has been alleged that the treaties were abused for the purpose of evading military duty.

¹ 2 Kent's Com. 49; *Inglis v. The Trustees of the Sailor's Snug Harbor*, 3 Pet. 99; *Shanks v. Dupont*, 3 Pet. 242; *The Santissima Trinidad*, 7 Wheat. 283; *Talbot v. Janson*, 3 Dall. 133; *Portier v. Le Roy*, 1 Yeates (Penn.), 371. *Contra*, *Alsberry v. Hawkins*, 9 Dana, 178.

² Act of July 27, 1868, 15 Stats. at L. 223; R. S. sec. 1999.

³ February 22, 1868.

⁴ August 1, 1868.

⁵ July 20, 1872.

¹² July 10, 1868.

⁴ July 19, 1868.

⁷ September 20, 1870.

¹⁰ May 6, 1872.

¹³ May 26, 1869.

⁶ May 26, 1868.

⁸ November 16, 1870.

¹¹ May 13, 1870.

In the development of the modern process of extradition, the credit of the initiative belongs to France. But, beginning with the Webster-Ashburton treaty, the United States, at an important stage in the history of the system, actively contributed to its growth by the conclusion of numerous conventions.¹ We cannot afford, however, to rest on our laurels. In recent times other nations, and particularly Great Britain since 1870, observing the propensity of criminals to utilize improved facilities of travel, have, by legislation as well as negotiation, vastly increased the efficiency of the system. It will therefore be necessary, if we would fulfil the promise of our past and retain a place in the front rank, steadily to multiply our treaties and enlarge their scope. No innovation in the practice of nations has ever more completely discredited the direful predictions of its adversaries than that of surrendering fugitives from justice.

The United States, acknowledging the force and supremacy of law, has given the weight of its example to the employment of arbitration as a means of settling international disputes not only as to the rights of individuals, but also as to the rights of nations. If asked for a proof of this statement, we may point to the fifty-three executed arbitral agreements to which, during the past hundred years, the United States has been a party; to the twelve cases in which the President, or some one appointed or approved by him, has acted as arbitrator or umpire; and to the five pending proceedings in which the government is now directly concerned.² In many of these arbitrations questions of national right of the highest moment, sometimes expressed in the terms of the agreement, but often lurking in the general phrases of a claims convention, have been submitted to judgment. The opinion of the world as to the general result is attested by recent efforts to establish a permanent system of arbitration, as proposed in the plan of the International American Conference, in the unratified treaty between the United States and Great Britain, and in the pending agreement lately adopted at the Hague.

We speak of the United States; and in its original design and

¹ Art. XXVII. of the treaty with Great Britain of 1794, commonly called the Jay treaty, required the surrender of fugitives charged with murder or forgery, but it was for the most part ineffective and expired by limitation in 1808. The Webster-Ashburton treaty, signed Aug. 9, 1842, provided (Art. X.) for extradition for any of seven offences. Treaties with other countries were soon afterwards made, ten being concluded while William L. Marcy was Secretary of State, during the administration of Pierce.

² See *International Arbitrations*, 6 vols.; also, the note at the end of this address.

purpose it still endures, and so may it endure forever! But, in the history of its diplomacy during the past hundred years, there is nothing more striking than the record of the national expansion. First, Louisiana,¹ then the Floridas,² then Texas,³ next a half of Oregon,⁴ soon afterwards California and New Mexico,⁵ and later the Gadsden purchase,⁶ it was no mere figment of the poetic fancy that depicted the nation's pioneer as going

" . . . joyful on his way
To wed Penobscot's waters to San Francisco's bay."

Not only extensive provinces, which had "languished for three centuries under the leaden sway of a stationary system," but also vast regions in whose wild solitudes the voices of nature spoke only to barbarian ears, were rescued from the dominion of misfortune and neglect, and dedicated to liberty and law and progress. And still the national advance continued. Distant Alaska, far reaching in its continental and insular dimensions, was added to the national domain;⁷ the Hawaiian Islands, long an object of special protection, were at length annexed;⁸ and Cuba, as the events of a century had foreshadowed, was detached from the Spanish crown, while by the same act all other Spanish islands in the West Indies, together with the Philippines and Guam in the Pacific, were ceded to the United States.⁹ By a treaty since made, Germany and Great Britain renounce in favor of the United States all their rights of possession or jurisdiction as to Tutuila and certain other islands in Samoa.¹⁰

The record of the century lies before us. We survey it perhaps with exultation, but we should not forget its graver meaning. With the growth of power and the extension of boundaries, there has come an increase of national responsibilities. The manner in which we shall discharge them will be the test of our virtue. To-day, reviewing the achievements of a hundred years, we pay our tribute to the wisdom, the foresight, the lofty conceptions and generous policies of the men who gave to our diplomacy its first impulse. It remains for us to carry forward, as our predecessors have carried forward, the great work thus begun, so that at the

¹ Treaty with France, April 30, 1803.

² Treaty with Spain, February 22, 1819.

³ Joint Resolutions of March 1 and December 29, 1845.

⁴ Treaty with Great Britain, June 15, 1846.

⁵ Treaty with Mexico, February 2, 1848.

⁶ Treaty with Mexico, December 30, 1853.

⁷ Treaty with Russia, March 30, 1867.

⁸ Joint Resolution, July 7, 1898.

⁹ Treaty with Spain, December 10, 1898.

¹⁰ December 2, 1899.

close of another century the cause of free government, free commerce, and free seas may still find in the United States a champion.

NOTE ON INTERNATIONAL ARBITRATIONS.—The arbitrations of the United States, the dates, unless otherwise stated, being those of the arbitral agreements, are as follows:—

Brazil: Whale Ship Canada, 1870.—Chile: Case of the Macedonian, 1858; claims, 1892; total, 2.—China: The Ashmore Fishery, 1884.—Colombia: Panama Riot and other claims, 1857; same subject, 1864; Montijo case, 1874; total, 3.—Costa Rica: Claims, 1860.—Denmark: Carlos Butterfield claims, 1888.—Ecuador: Claims, 1862; Santos case, 1893; total, 2.—France: Claims, 1880.—Great Britain: St. Croix River, 1794; Islands in Bay of Fundy, 1814; N. E. Boundary, 1814; same subject, 1827; River and Lake boundary, 1814; Lake and Land boundary, 1814; San Juan boundary, 1871; Hudson's Bay Co. claims, 1863; Impediments to Recovery of Debts, 1794; Neutral Rights and Duties, 1794; Compensation for Slaves, 1818; same subject, 1822; same subject, 1822; claims, 1853; Reserved Fisheries, 1854; Alabama claims, 1871; Civil War claims, 1871; Fisheries, 1871; Fur Seals, 1892; Behring Sea Damage claims, 1896; total, 20.—Hayti: Pelletier and Lazare cases, 1884; claims, 1885; Van Bokkelen case, 1888; total, 3.—Mexico: Claims, 1839; claims, 1868; Oberlander case, 1897; total, 3.—Nicaragua: Claims, 1900.—Paraguay: United States and Paraguay Navigation Co., 1859.—Peru: Cases of the Georgiana and Lizzie Thompson, 1862; claims, 1863; claims, 1868; MacCord case, 1898; total, 4.—Portugal: Brig General Armstrong, 1851; Delagoa Bay Railway, 1891; total, 2.—Salvador: Savage claim, 1864.—San Domingo: Ozama Bridge case, 1887.—Siam: Kellett case, 1897; Cheek case, 1897; total, 2.—Spain: Spoliations, 1795; Case of the Colonel Lloyd Aspinwall, 1870; Cuban claims, 1871; case of the Masonic, 1880; total, 4.—Venezuela: Claims, 1866; claims, 1885; Venezuela Steam Transportation Co., 1892; total, 3.—Grand total, 57, all but 4 since 1800.

The President of the United States has acted as arbitrator in the following cases: Argentine Republic and Brazil Misiones boundary, 1889; Argentine Republic and Paraguay, Middle Chaco territory, 1876; Colombia and Italy, Cerruti case, 1894; Costa Rica and Nicaragua boundary, 1886; Great Britain and Portugal, Island of Bulama, 1869.—Total, 5.

Ministers of the United States have acted as arbitrator or umpire in the following cases: Argentine Republic and Chile boundary, 1896; Chile and Peru, disputed accounts, 1874; Great Britain and Brazil, Dundonald claim, 1873; Great Britain and Colombia, Cotesworth and Powell claim, 1872; Great Britain and Honduras, claims, 1859; Italy and Switzerland, Cravairola boundary, 1873.—Total, 6.

Under the treaty between Costa Rica and Nicaragua of 1896, for the final settlement of their boundary, the President of the United States appointed General E. P. Alexander, a citizen of the United States, as engineer-umpire.

Arbitrations are now pending between the United States and other powers as follows: Chile, claims, 1897; Germany and Great Britain, Samoan claims, 1899; Guatemala, May claim, 1900; Hayti, Metzger case, 1899; Russia, Behring Sea seizures, 1900.—Total, 5.

The treaty between the United States and Mexico of Feb. 2, 1848, contains (Art. XXI.) a general clause as to arbitration; and the same principle is exemplified in the treaties relating to the boundary between the two countries. *Int. Arbitrations*, ii. 1287, 1358.

Great Britain, besides 20 with the United States and 4 in which the President or a minister of the United States has participated, has had arbitrations with other powers as follows: Argentine Republic, claims, 1858; closure of port of Montevideo, 1864.—

Belgium, Ben Tillett case, 1897. — Brazil, maritime captures, 1829; claims, 1858; case of the Forte, 1862. — Buenos Ayres, maritime spoiliations, 1830. — Chile, claims, 1883; claims, 1893. — Colombia, Punchard & Co. claim, 1896. — France, Portendic claims, 1842; Mineral Oil claims, 1873; Greffühle Concessions, 1893 (award). — Germany, Island of Lamu, 1889. — Greece, claims, 1850. — Hayti, claims, 1890. — Liberia, boundary, 1871. — Mexico, claims, 1866. — Netherlands, case of the Costa Rica Packet, 1895. — Nicaragua Mosquito Indians, 1881 (award); claims, 1895. — Peru, White claim, 1864 (award). — Portugal, claims, 1840; Croft case, 1856 (award); Yuille and Shortridge claim, 1861 (award); territory on East coast of Africa, 1872; Delagoa Bay Railway, 1891; Manica boundary, 1895. — South African Republic, boundary, 1884. — Spain, Schooner Mermaid, 1868; marine tort, 1887. — Venezuela, claims, 1868; British Guiana boundary, 1897. — Total, 33.

France, during the past hundred years, has had arbitrations, besides the 4 already mentioned, as follows: Allied Powers, claims, 1814. — Chile, claims, 1882; claims, 1895. — Chile and Peru, guano funds, 1894. — Hayti, claims, 1891 (or 1892). — Mexico, claims, 1839. — Netherlands, interest on the Dutch Debt, 1815; Guiana boundary, 1888. — Nicaragua, case of the Phare, 1879. — Spain, question of prize, 1851. — Venezuela, claims, 1864; Fabiani case, 1891. — Total, 12.

Other arbitrations between various countries may be enumerated as follows: Argentine Republic and Chile, boundary, 1896; Austria and other powers, as to duchy of Bobillon, 1815; Austria and other powers as to cantons of Tessin and Uri, 1815; Austria-Hungary and Chile, claims, 1885; Belgium and Chile, claims, 1884; Chile and Italy, claims, 1882; Chile and Sweden and Norway, claims, 1895; Chile and Switzerland, claims, 1886; China and Japan, killing of a Japanese in Formosa, 1876 (about); Colombia and Costa Rica, boundary, 1880-1897; Colombia, Ecuador, and Peru, boundary, 1894; Colombia and Venezuela, 1881-1886; Khedive of Egypt and M. de Lesseps, accounts, 1864; Egypt and Foreign Powers, claims, 1883; Germany and Chile, claims, 1884; Germany and Hayti, 1895; Hayti and San Domingo boundary, 1895 (about); Italy and Brazil, claims, 1896; Italy and Persia, customs duties, 1890; Italy and Portugal, Lavarello case, 1892; Japan and Peru, case of the Maria Luz, 1873; Mexico and Guatemala boundary, 1882; Netherlands and Dominican Republic, case of the Havana Packet, 1881; Netherlands and Venezuela, Aves Islands, 1865 (award); Peru and Bolivia, question of salute to flag, 1895; arbitration between two African tribes as to the use of wells, 1887. — Total, 26.

The whole number of international arbitrations during the present century, exclusive of cases now pending and incomplete, is, according to the above list, 136.

It should be observed that in certain lists that have lately been circulated there have been included as arbitrations not only numerous cases of mediation, but also ordinary boundary surveys, domestic commissions, direct treaty settlements, and even examples of pure diplomatic negotiation, such as the Anglo-American joint commission of 1898-99. Such lists are to be deprecated. While they tend to mislead impulsive and indiscriminating writers, they also invite attack.

John Bassett Moore.

LIABILITY FOR NEGLIGENT LANGUAGE.

CAN an action ever be maintained for negligence in the use of language? Or, to put it more fundamentally: Is there ever a legal duty, except when created by contract, to be careful in the use of language? That there is no such universal duty may be conceded. But our inquiry is whether there are any conceivable circumstances under which such a duty may be held to exist. Can it be said that "the law, as distinguished from contract, does sometimes impose a duty to take reasonable care to tell the truth"?¹

The discussion of this question has been suggested by the result reached by the House of Lords in 1889, in the case of *Peek v. Derry*.² In that case, *Derry et als.*, the directors of a tramway company, put forth a prospectus to induce the public to subscribe for stock. The prospectus contained the following unqualified statement: "... the company has the right to use steam or mechanical motive power instead of horses, . . ." In fact, the company had not such right. The statute permitted the use of steam as a motive power only in case the company first obtained the consent of the Board of Trade and of two municipal boards. Some of these consents were never obtained, and the stock was worth less than if the company had had the right to use steam. Peek, a stockholder who had purchased on the faith of the prospectus, sued the directors for deceit in making the above positive representation. The judge of first instance (Stirling, J.) and the Law Lords took a very charitable view of the evidence, and were of opinion that the directors all believed the statement to be true, even though they had no reasonable ground for such belief.³ The Court of Appeal (Cotton, Hannen, and Lopes, L. JJ.) unanimously held the directors liable in this action for deceit, on the ground that they made the statement without any reasonable ground for believing it to be true. The House of Lords overruled the Court of Appeal, and restored the decision of Mr. Justice Stirling, who held that the defendants were not liable.

¹ See Moncrieff's *Law of Fraud and Misrepresentation*, 152, 154.

² L. R. 14 Appeal Cases, 337.

³ For an able criticism of the view that the directors all believed the statement, see 5 *Law Quarterly Review*, 420-422; and compare 6 *Law Quarterly Review*, 73.

Taking the facts to be as they were understood by the Law Lords, this decision of the House of Lords seems to be correct. The action, though brought under the modern forms of procedure, was, in substance, the old action on the case for deceit, and it was so treated by the counsel on both sides and by the judges. In such an action the plaintiff alleges that the defendants have consciously falsified; *i. e.* that they have stated what they did not believe to be true. He cannot maintain this allegation by showing merely that they have stated what they ought not to have believed. Want of reasonable ground for belief is, of course, a piece of evidence bearing on the question of non-belief. But if it fails to convince the tribunal of the non-existence of belief, it does not make out a case of deceit. "Negligence is not the same as fraud." An action of deceit based on fraud cannot be supported by proof of negligent misrepresentation. "A plaintiff cannot succeed in an action for fraud without proving that the defendant was fraudulent." "If a man complains of having been deceived, he must show that the defendant is a liar," and not merely negligent.

Assuming the House of Lords to be right in holding that the plaintiff in *Peek v. Derry* could not recover for the cause of action which he had declared upon, the question remains whether the plaintiff would have succeeded if he had sued for negligence, alleging a duty on the part of the defendant to use reasonable care.

This extremely important inquiry has not, in England, received the attention it deserves. In English courts it is now summarily dismissed with the short statement that it was "decided" in the negative by the House of Lords in *Peek v. Derry*; that it was there "finally decided," "settled for good."¹ That case, "as interpreted by the courts, is held to show not only that negligence is not the same as fraud, but also that no action whatever will lie for negligent misrepresentation."² But this interpretation is erroneous. No doubt Lord Herschell, who gave the principal opinion, took it for granted that an action for negligence could not have been maintained against the defendants; but this assumption of that very able judge is at the most a mere *dictum*. The point was not, and could not have been, there decided; for it was not before the court. The only question was whether the

¹ See Bowen, L. J., in *Angus v. Clifford*, L. R. (1891) 2 Chan. 449, p. 470; Lindley, L. J., S. C., p. 464; Bowen, L. J., in *Le Lievre v. Gould*, L. R. (1893) 1 Q. B. 491, p. 501; Lindley, L. J., in *Bishop v. Balkis Consolidated Co.* (1890), L. R. 25 Q. B. D. 512, p. 521.

² 7 Law Quarterly Review, 310.

action for deceit would lie. "Because an action for deceit, involving fraud, cannot be based on a merely negligent misrepresentation," it does not necessarily follow that there is to be "no action for negligence."¹

The plaintiff in *Peek v. Derry* could not, upon that declaration, have recovered for negligence; for the simple reason that he had not alleged negligence, but an entirely different thing, viz. fraud. Under that declaration, evidence of negligence, if offered as sustaining a substantive cause of action, would have been rejected on the ground of variance.² But whether the plaintiff might have recovered for negligence *if his declaration had averred negligence*, is an entirely different question, and is not concluded by that decision. Suppose that Peek, on the very next day after the rendition of final judgment for the defendants in the original action of deceit, had brought a new action claiming to recover on the ground of the defendant's negligence, could the defendants have successfully pleaded the judgment in the former action of deceit in bar of this new action for negligence? It hardly seems reasonable to say that negligence is to be excluded as a ground for recovery in cases of misrepresentation, "simply because the old action for deceit recognized only intentional misrepresentation as within the scope of that action."³

The English law, both as it might have been, and as it practically is, will be found well summarized in Pollock's *Law of Fraud in British India*: "The law might have made this much the positive duty, apart from any question of contract, of persons who, for their own purposes, volunteer statements for others to act upon in matters of business; namely, not that the statement shall be absolutely true, but that reasonable care shall be used to verify it before it is made. But it is now settled that such is not the law in England. . . . We may like it or not, but English courts must now decline to recognize a positive duty of using any, even the lowest degree of diligence, in making allegations about supposed matters of fact. We must go upon the bare issue of belief. Gross and palpable want of reasonable grounds may lead us to find that there was no belief at all; in other words, to say that there was actual falsehood, the falsehood which is the necessary and specific badge of fraud. But it will be fraud or nothing."⁴

¹ Moncrieff's *Law of Fraud and Misrepresentation*, 152.

² Proof of want of reasonable ground for belief would have been admissible only as bearing on the issue of the non-existence of belief.

³ See Innes, *Principles of Torts*, 54, note.

⁴ Pollock, p. 93.

The above view as to the *settled* nature of the English law rests, as has been shown, upon a *dictum* in the House of Lords.¹ That tribunal has recently held that it cannot (which simply means that it does not choose to) overrule its own decisions;² but we are not aware that it has yet held that its *dicta* are not open to future question. This particular *dictum* has not passed into settled doctrine without vigorous protest.³ "It has already been found necessary in England to obviate its effects as regards future cases arising on the prospectuses of companies and other invitations to subscribe for shares or debentures by special legislation."⁴

In the United States this question is not concluded by authority. Shall those American courts which deny a remedy for deceit, in cases like *Peek v. Derry*,⁵ allow the remedy for negligent misrepresentation which the English courts are understood to deny; or shall the possibility of obtaining remedy in such cases be left to legislative discretion?

Let it be noted that we are not at this moment considering the question whether the law should recognize and enforce a general duty, of all the world to all the world, to be careful in all statements, upon all subjects; nor whether the law should recognize as broad a duty of care in the utterance of language as in all other acts or relations of life. The present inquiry is comparatively a narrow one, viz., whether the law should recognize a duty to be careful in the use of language, if the enforcement of such duty

¹ We are speaking now of the way in which this point has been dealt with by the highest English tribunal. We do not assert that there are no cases in the lower courts which uphold this view. See the opinion of Bramwell, L. J., in *Dickson v. Reuter's Telegraph Company* (1877), L. R. 3 Com. Pl. Div. 1, p. 6. Compare Moncrieff's explanation of Lord Justice Bramwell's position, Moncrieff, 152.

² *London Street Tramways Co. v. London County Council*, L. R. (1898) Appeal Cases, 375.

³ See 9 Law Quarterly Review, p. 202; 8 Law Quarterly Review, p. 7. In this connection it seems proper to say that the present article is suggested by, and largely founded upon, English criticisms of the prevailing English view.

⁴ Pollock's Law of Fraud in British India, 55, referring to "The Directors' Liability Act," (1890) 53 and 54 Vict. ch. 64: By this statute, directors and others issuing prospectuses are made liable, in certain cases, to compensate persons sustaining loss by reason of any untrue statement in the prospectus, unless it is proved that the parties issuing the prospectus had reasonable ground to believe, and did believe, that the statement was true.

⁵ The decision of the House of Lords in *Peek v. Derry* is not universally followed in the United States. For expressions of the contrary doctrine, see *Seale v. Baker* (1888), 70 Texas, 283; *Watson v. Jones* (Florida, 1899), 25 Southern Reporter, 678; *Gerner v. Mosher* (Nebraska, 1899), 78 Northwestern Reporter, 384; *Krause v. Busacker* (Wisconsin, 1900), 81 Northwestern Reporter, 406. In many States the question is still an open one.

could be confined to cases like *Peek v. Derry*. Of course, if this question is answered affirmatively, other questions will have to be considered, *e. g.* can the duty be restricted to cases like *Peek v. Derry*; or, if extended beyond the facts of that case, can it be confined within reasonable limits; or does the recognition of the duty in that class of cases necessarily carry with it the recognition of a similar duty in a much wider class of cases where great injustice would result from its enforcement? These latter questions really present the principal difficulty in this matter; and it is intended, at a later stage of the discussion, to give them due consideration. But, for the present moment, we are concerned only with the question whether this duty should be recognized, if its application could be restricted to cases similar to *Peek v. Derry*.

In *Peek v. Derry* the following propositions may be regarded as established:—

1. Defendants volunteered a statement to the plaintiff.
2. The statement was not true in fact.
3. Defendants, though believing the statement, had no reasonable ground for such belief, and would not have entertained it if they had used reasonable care to ascertain its truth.
4. Defendants made the statement with the intention that plaintiff should act upon it in a matter of business.
5. Defendants' motive was to procure pecuniary advantage to themselves.
6. The subject-matter of the statement was such that plaintiff, if he acted in reliance upon it, would be likely to incur substantial pecuniary loss in case the statement proved incorrect.
7. Plaintiff acted in reliance upon the statement.
8. Plaintiff was damaged by so acting.

To these propositions it would seem that we may properly add one more — not a subject of special discussion in that case — *viz.* Plaintiff acted reasonably in relying upon the defendants' statement.

Assuming the facts to be as above, the argument for defendants' liability is so obvious that there can be no need to enlarge upon it. We may fairly call upon the defendants to show cause why they should be exonerated. What are the arguments in their behalf?

The defendants may urge that allowing an action for negligence upon the facts of *Peek v. Derry* amounts to practically asserting that negligence is the full equivalent of deceit; or that it blurs the distinction between deceit and negligence. But a careful comparison of the requisites in an action for deceit with the facts of *Peek*

v. Derry will disclose important differences in more than one particular, showing that the plaintiff in *Peek v. Derry* makes out a much stronger case than would be necessary to his recovery if the defendants had been guilty of conscious falsehood. Thus, in *Peek v. Derry* the statement was volunteered by the defendants; whereas, in an action for deceit, the defendant may be liable though the statement was made in answer to an inquiry. It is also true in *Peek v. Derry* that the statement was made by the defendants with the motive or purpose of serving their own pecuniary interest; whereas, in an action for deceit, it is not necessary to show such a motive. Again, in *Peek v. Derry* the plaintiff acted reasonably in relying upon the defendants' statement; and this is an essential feature of his claim to recover for the defendants' negligence. A plaintiff suing for defendants' negligence will be barred by his own contributory negligence. But the case is different where the plaintiff is suing for defendants' intentional wrong. In an action for deceit, although there is some conflict in the authorities, it is the better view that the defendant cannot escape on the ground of the plaintiff's negligence. In other words, defendant cannot say that plaintiff's folly in believing what defendant intended him to believe exonerates defendant from liability for his conscious falsehood, uttered by him with intent to induce plaintiff to believe and to act upon it.

Defendants may seek to justify allowing a remedy in cases of deceit and denying it in cases of negligence, upon the ground that in deceit there is always moral blame. But is there not moral blame in negligence? Undoubtedly the turpitude is not so great as in lying, but in its civil aspect it differs only in degree. And where a man having especial opportunities for information makes statements with the intention of inducing the hearer to take important action in reliance thereon, and makes these statements without reasonable grounds, his moral fault is great. The question is not whether a remedy shall be allowed for all negligent misstatements, but whether it shall be allowed in a class of cases where the negligence is especially deserving of censure.

Can the defendants claim that the nature of the instrument whereby the wrong is done necessarily exonerates them from liability? Strictly speaking, and according to the better juristic definitions, words are "acts."¹ And even if, recognizing "a

¹ See Terry's *Leading Principles of Anglo-American Law*, section 81. Compare 1 Bentham's *Introduction to the Principles of Morals and Legislation*, chap. vii. section xii.

certain antithesis between saying and doing in common speech," we distinguish words from other acts, still the law in various instances holds that actionable wrongs may be committed by "mere words."¹ But it has been supposed in some quarters that the law, although not denying in all cases remedy for damage caused by words, draws the line at negligence. While the man who knowingly utters a false statement may be liable in an action of deceit, and the utterer of defamatory statements may be liable in an action of slander (irrespective of negligence), it is said that, "generally speaking, there is no such thing as liability for negligence in word as distinguished from act;" and it is averred that "this difference is founded in the nature of the thing."²

What are the intrinsic differences between words (spoken or written) and other acts, which justify this broad distinction?

It has been urged as a reason for non-liability that language (*e. g.* a statement in a valuation or a prospectus) cannot be considered "a dangerous instrument," or "an instrument which is dangerous in itself." This argument is beside the real issue. No one contends that the utterance of non-defamatory language belongs to the class of extra-hazardous acts where the actor is held to the liability of an insurer; like the keeping of a tiger. But disclaiming such a rigorous rule, the question is whether there may not be in some cases a duty to use reasonable care in the utterance of language. It is undeniable that the making of erroneous statements without reasonable grounds is liable under some circumstances to cause damage, and frequently causes great damage. Why not then impose in certain cases a duty to use reasonable care to refrain from making erroneous statements? If in handling a pen I carelessly scratch my neighbor's face, I am liable to him for the damage thus done. If, with the same pen, I write a letter to my neighbor making statements not true in fact, whose untruth would have been known to me if I had used reasonable care, and my neighbor is induced (as I intended he should be) to peril his fortune in reliance on my statements, why should he be denied a remedy against me in case of his financial ruin? Must a man take care as to the use of his arm, but not as to the use of his tongue? Must he take care how he hits another person with a pen, but not how he affects the interests of that other person by what he writes with the same pen?

The objection of novelty will probably be urged. There is, it

¹ See Terry, *ubi supra*.

² Pollock, *Torts*, 2d ed. 487.

will be said, a total lack of precedent for the imposition of liability in such cases.

To this it may be answered : First, that there is a special reason why the experiment of an action for negligence *eo nomine* has not been attempted ; second, that, in fact, liability has repeatedly been imposed in similar cases under the cover of legal fictions.

The failure, hitherto, to attempt the experiment of bringing actions for negligence *eo nomine* is in considerable degree to be accounted for by the fact that, until very lately, a remedy for negligent misstatement was supposed in many quarters to be obtainable at law under a declaration counting on deceit,¹ (and indeed may still be thus obtained in some parts of the United States.) Of the widespread existence of such a supposition, the decision of the Court of Appeal in *Peek v. Derry* affords ample evidence ; but reference may also be made to the explicit statements of leading text-writers in volumes published shortly before the decision of the House of Lords in that case.² So, too, it was long understood that, whatever might be the rule at law, a remedy for negligent misrepresentation would be allowed by courts of equity in all cases falling within their jurisdiction ; and this view was not distinctly rejected in England until the recent decision in *Low v. Bouverie*, subsequent to *Peek v. Derry*.³

Nor is it true that there is a total lack of precedent for imposing legal liability in cases of negligent misstatement. No doubt, actions for negligence *eo nomine* are scarce ; but liability for such misstatement has frequently been imposed under cover of legal fictions.⁴ This is true of certain decisions professedly based on "implied" representations, or "implied" warranties, or "conclusive presumptions of knowledge,"⁵ and the like. Implications and

¹ See Beven on Negligence, 2d ed. 1474.

² See 1 Bigelow on Fraud (edition of 1888), 509, 516, 517 ; 2 Pomeroy Equity Jur. (edition of 1882), section 884, and comment in 2d ed. published after the decision in *Derry v. Peek*, vol. 2, section 884. See, also, Moncrieff's Law of Fraud and Misrepresentation, 130-137.

³ See Lindley, L. J., in *Low v. Bouverie*, L. R. (1891) 3 Chan. 82, p. 100 ; Pollock's Law of Fraud in British India, 31, 46, 47.

⁴ The nominal *ratio decidendi* in some of these cases would go far enough to include even non-negligent misstatements. But it is probable that in the vast majority of these cases the misstatements were negligently made.

⁵ "The directors are conclusively presumed to know the condition of the bank. . . . If the directors did not know the bank was insolvent, it was their duty to have known it." Clark, J., in *Tate v. Bates* (1896), 118 North Carolina, 287, p. 308.

"It is the duty of the directors to know the condition of the corporation whose affairs they voluntarily assume to control, and they are presumed to know that which

presumptions are often resorted to for the purpose of concealing the fact that the judge is laying down a new rule of substantive law. "It is very desirable that we should get quit of these 'idola' of legal fraud, and implied representation, and attain to some general rule as to the reasonable care which every one is bound to take lest his words or acts harm his neighbor. . . ." ¹ Moreover, in addition to these indirect enforcements of liability for negligent misrepresentation, there is at least one decision, even in England, which squarely affirms such liability. The decision in *George v. Skivington* (A. D. 1869) rests on this basis; and the *ratio decidendi* is clearly stated in the opinion of Cleasby, B.² In that case B. bought a bottle of hair-wash of A., stating that it was to be used by X. A. negligently represented that the liquid was fit for use on the hair. X. used the wash, and suffered physical damage from its unfitness. X. was allowed to recover against A.³ Efforts have recently been made to distinguish *George v. Skivington* from

is their duty to know, and which they have the means of knowing." Acker, J., in *Seale v. Baker* (1888), 70 Texas, 283, p. 290.

"It is there said that the *scienter* may be proved by showing — . . . third, that the party's special situation or means of knowledge were such as to make it his duty to know as to the truth or falsity of the representation. . . . For when it is shown that the statement was material and false, and that the defendant's situation or means of knowledge were such as to make it incumbent upon him as a matter of duty to know whether the statement was true or false, the conclusion is almost irresistible that he did know that which his duty required him to know. For this reason the law conclusively presumes, from the existence of these facts, that defendant had actual knowledge of the falsity of his statement; or, more properly speaking, proof of these facts is sufficient to sustain a charge of actual knowledge, dispensing with further proof upon that subject, and admitting no proof to rebut the fact of actual knowledge, but only proof to rebut the existence of the facts from which such actual knowledge is inferred." Carter, J., in *Watson v. Jones* (Florida, 1899), 25 Southern Reporter, 678, p. 682.

See, also, *Ward v. Trimble* (Kentucky, 1898), 44 Southwestern Reporter, 450, p. 452.

¹ 5 Law Quarterly Review, 102.

² L. R. 5 Exch. 1, p. 5.

³ See, also, two recent American cases, where a person having no contractual relation with a physician recovered against him for damage caused by his negligent statement. *Harriott v. Plimpton* (1896), 166 Mass. 585; *Edwards v. Lamb* (New Hampshire, 1899), 45 Atlantic Reporter, 480; 14 HARVARD LAW REVIEW, 66. In the first case the physician, being employed by a third person to examine the plaintiff, negligently reported that the plaintiff had a certain disease, which in fact he did not have. In the second case the physician was employed by the plaintiff's husband, and, while treating him for an infectious sore, negligently advised the wife that it would be safe for her to assist in dressing the sore.

In *Landle v. Western Union Tel. Co.* (North Carolina, 1900), 35 Southeastern Reporter, 810, a telegram had not been delivered, and the telegraph company was not in fault for the non-delivery; but the company negligently asserted that it had been delivered. The court said: "We think that the assurance of the defendant, false

negligent misrepresentation in prospectuses and valuations, on the ground that the damage in *George v. Skivington* was physical. But what intrinsic difference is there between damage to the person and damage to the purse?¹

Furthermore, in regard to the objection of novelty, it goes without saying that lack of precedent is not necessarily and always fatal. The leading case on deceit, *Pasley v. Freeman*, was in its day regarded as a new departure. And there is no topic of the law in which lack of precedent is entitled to less weight than in negligence. Negligence is largely a modern conception, and the scope of the action is constantly widening. Legal remedy is allowed to-day as to various states of facts where no one would have dreamed of suing a century ago. "As society becomes more complex, and the consequences of negligence more far-reaching, the obligation of using care becomes stricter in morals, and will have to become stricter in law, notwithstanding *Derry v. Peek*."² And the legal periodical just quoted said, shortly before the final decision in *Peek v. Derry*, . . . "the law is rapidly tending toward the enforcement (contrary, no doubt, to old authorities and some recent ones) of a general duty to be careful, as well as to abstain from wilful harm, in statements as well as in acts."³ Of course

in fact, if not in intention, was actionable negligence, and that the plaintiff can recover such damages as directly resulted therefrom."

¹ In this connection brief reference may be made to a line of decisions in this country as to liability for mistakes in the transmission of telegrams. If a telegram is delivered in an altered form, owing to the negligence of the telegraph company, has the receiver an action against the company for the loss that he sustains through acting on the telegram in its erroneous form? England says, no. America says, yes. The result reached in this country tends, in our opinion, to sustain the theory that there may be, under some circumstances, a legal duty to be careful in the use of language; we mean, of course, a duty not created by contract between the defendant and the plaintiff. But it must be admitted that the result has not generally been based by the court upon this broad ground; and that most of the reasons given for these decisions imply (what, indeed, is sometimes distinctly asserted) the non existence of such a duty. It is impossible, however, to examine the opinions in these cases without feeling that the courts have not touched bottom. Various reasons have been brought forward, but none command universal assent. On the contrary, the followers of any one theory are very apt to indulge in severe criticism of all the other theories; and it is sometimes admitted by those who sustain the result that no entirely satisfactory reason has yet been given. Under such circumstances one who believes in the result may fairly presume that a better reason exists; and it is submitted that such a reason can be found in the general doctrine suggested in this article. More than one thoughtful jurist has already expressed views tending in this direction. See *Allen's Telegraph Cases*, p. 455, note; *Bigelow's Leading Cases on Torts*, 626.

² 7 Law Quarterly Review, 107.

³ 5 Law Quarterly Review, 103.

there are limits to the expansion of liability for carelessness ; and an attempt has recently been made in this REVIEW to criticise a line of decisions whereby liability has been unduly extended.¹ It cannot, however, be denied that there is a general tendency to extend the obligation of using care.

Thus far we have been considering whether the law should recognize a duty to be careful in the use of language, if the enforcement of such duty could be confined to cases like *Peek v. Derry*. Our conclusion is that an action should be allowed in cases like *Peek v. Derry* ; and, further, that the line should be drawn a little lower down so as to give a remedy in cases differing in two respects from *Peek v. Derry*. We do not think it an essential requisite that the statement should have been made from the selfish motive of serving the defendant's own interest. Neither should the action be confined to written misstatements. There is undoubtedly greater danger of mistake or falsehood in testimony as to the fact of verbal utterances than in testimony as to acts in general. But this acknowledged danger exists equally in actions for deceit by verbal statement ; and yet such actions are universally allowed by the courts.²

There remains to be considered the most important objection to allowing an action for negligent misstatement. That objection may be stated as follows : " If the principle of liability for negligence in statements is once admitted by the courts as a ground for recovery, it cannot be confined to cases like *Peek v. Derry* (or to cases, like those we have suggested, modifying slightly the elements of *Peek v. Derry*). There will be no stopping-place short of enforcing a legal duty to use reasonable care in making *all* statements ; and whenever any careless misstatement is acted upon by the hearer to his damage, an action will lie. The consequences would be deplorable. If the law took account of every idle word or chance remark, life would be intolerable."

It must be conceded that such a wide rule of liability would be fraught with evil consequences. If the law is really reduced to the alternative, either of denying remedy in cases like *Peek v. Derry*, or of admitting remedy for all careless statements followed by damage, it would undoubtedly be better to adopt the former alternative and refuse to allow remedy under any conceivable circumstances for negligent misstatements. But the law is not

¹ 11 HARVARD LAW REVIEW, 349, 434.

² It is the legislature, not the court, which has in some classes of cases restricted the remedy for deceit to instances where the statement was made in writing.

bound to take one of the horns of this dilemma, nor would such a course be sustained by analogy. Thus, the law allows in some cases an action for deceit, but does not give such an action for all lies. So the law treats certain defamatory words as actionable *per se*, but does not so regard all defamatory charges. The guiding principle of the courts is not logic, nor yet legal symmetry, but expediency. And there are strong grounds of expediency for adopting the rule we have suggested; and for refusing to entirely assimilate the duty of care in the use of words to the duty of care in the use of chattels. Even if the law recognizes that there may be such a thing as a duty to be careful in the use of one's tongue, it does not necessarily follow that the duty should be held to be as universal and as far-reaching as the duty to be careful in the use of one's axe. The cases differ, both in the stringency of the reasons for establishing a duty and in the weight of the burden which would thus be imposed.

On the one hand, negligence in the use of tangible objects is, in the great majority of instances, much more likely to cause serious damage than negligence in the use of language.

On the other hand, a duty to be careful on ordinary occasions in the use of language is a more burdensome restriction on humanity, a greater clog on freedom of intercourse, than a general duty to be careful in the use of chattels.¹ It is not consistent with common convenience to require a man to be as careful in the use of his tongue as in the use of his knife. Here is where we may properly fall back upon the previously quoted statement of Sir Frederick Pollock, that there is a difference "in the nature of the thing." That difference is such as to justify the imposition of a duty of care in the use of words more sparingly, and in a more restricted class of cases, than the duty of care in the use of chattels. But the difference is not so great as to justify the view that no duty of care in the use of language should ever be imposed under any conceivable circumstances.

While the following propositions can undoubtedly be expressed in better form, we submit that they formulate, in substance, the true rule on this subject.

An action for misstatement should be allowed when these requisites are present:—

1. Defendant volunteered a statement to the plaintiff.

¹ See Bramwell, L. J., in *Dickson v. Reuter's Telegraph Co.* (1877), L. R. 3 Com. Pl. Div. 1, p. 6.

[As to "volunteered," see subsequent explanation in reference to propositions 1, 4, and 5.

"To the plaintiff" includes not only statements made directly to plaintiff in person, but also statements made to third persons with the intent that they should be communicated to the plaintiff, and statements to the class of persons to which plaintiff belongs.]

2. The statement was not true in fact.

3. Defendant, though believing the statement, had no reasonable ground for such belief.

[This presents the inquiry of fact as to the conduct of the average prudent man; a common question for jurors in actions of negligence.]

4. Defendant made the statement with the intention that plaintiff should act upon it.

5. The subject-matter of the statement was such that one who acted in reliance upon it would be likely to incur substantial pecuniary loss in case the statement proved incorrect.

[See subsequent explanation in regard to propositions 1, 4, and 5.]

6. Plaintiff acted in reliance upon the statement, and such action and reliance on his part was reasonable.

[It may seem, at first blush, that if the defendant is negligent in making his statement, the plaintiff must also be negligent in giving it credence. But there are cases where this would not be true; as where the defendant had special sources of knowledge open to him, and the plaintiff not unnaturally supposed that the defendant had availed himself of these sources of information.]

7. Plaintiff was damaged by so acting.*

The foregoing requirements will probably be found fault with upon very opposite grounds; one set of critics complaining that they err on the side of stringency, and another set alleging that they are too lax.

Propositions 1, 4, and 5 are likely to be especial subjects of criticism on the ground of overstringency. One and the same general reason furnishes the argument for retaining these propositions in their present form. It will be admitted on all hands that men should not be held liable for unintentional misstatements in casual talk or in conversation upon apparently trivial matters; and that such liability should attach only under exceptional circumstances. But a general instruction of this nature by a judge in his charge to the jury would be practically equivalent to laying down no limit at all. It is not desirable to submit to the varying judgment of

successive panels of jurors the general question, under what circumstances the law should impose a duty to be careful in the use of language. On the contrary, the court should lay down definite tests, and then submit to the jury the question whether the evidence in the particular case in hand brings it within those tests. Any other course would inevitably result in the occasional rendition of verdicts upon inexpedient grounds, and in the frequent bringing of suits upon frivolous grounds. The tests adopted, without aiming at mathematical accuracy, should be such as will promote justice and discourage injustice in the greater number of cases.

Tried by these rules, propositions 1, 4, and 5 seem entirely defensible. In case of statements volunteered by the speaker, with intent that the hearer should act upon them, and with knowledge that action upon that subject-matter is likely to entail serious loss to the actor if the statement is incorrect, the average man ought to fully recognize his moral responsibility to be careful. But when any one of these elements is lacking, the hardship of imposing liability is sensibly increased.

A selfish motive on defendant's part does not seem to us an essential requisite, but the existence of such a motive might often be decisive evidence of the intent with which defendant made the statement.

Should the remedy be confined to negligent misstatements of fact, or should it be extended in some cases to the utterance of negligently formed (or negligently expressed) opinions? In the great majority of cases the utterer of a negligently formed opinion could escape liability on the ground that it was not reasonable for the hearer to rely on the mere opinion of another. The plaintiff would fail to sustain proposition 6, *ante*. But this would not always be true. Take the case of an expert stating to a non-expert his opinion on matters requiring peculiar skill or knowledge. Or take the case where the so-called "opinion" is in reality an assertion that facts exist which justify a certain conclusion. In such instances it is difficult to see why a plaintiff (who acts reasonably in relying on the statement) may not recover against one who negligently volunteers an erroneous "opinion," intending the plaintiff to act upon it, and knowing that substantial loss is likely to follow if the "opinion" proves incorrect.

If a duty to be careful in the use of language is admitted to

exist in certain cases, a defendant cannot plead that his utterance was a slip of the tongue, and did not express his real view. His liability must depend, not on what he meant to say, but on what he actually did say. Negligent misstatement exists just the same, whether it be due to carelessness in forming a belief or to carelessness in the mode of expressing one's belief. Whether a defendant in an action for deceit may escape liability by proving that he did not intend to convey the meaning which his words would naturally convey, is a question upon which able judges have recently differed.¹ But surely such a defence cannot be allowed where the action is founded, not on the charge of conscious falsehood, but on the charge of carelessness. Proof of good intent does not disprove an accusation of negligence.

If the right of action for negligent misstatement is once admitted, troublesome questions of a collateral nature may arise. Thus, it may be, in some cases, "a matter of difficulty to determine whether the plaintiff was one of the persons to whom the representation was addressed, and who were intended to act upon it." But questions of this description are not new to the law. The same difficulty occurs in actions for deceit, and does not prevent the courts from entertaining such actions.

Again, very nice questions may arise as to whether the defendant's fault can, in a given case, be regarded as the legal cause of the plaintiff's damage. But this is a difficulty which must be met in all cases of tort, and does not furnish *per se* ground for disallowing any remedy.²

So far, we have been considering cases where the damage to the plaintiff is caused, in one sense, by his own action, taken in reliance upon the erroneous statement made to him by the defendant. How is it if the damage results from the effect produced upon third persons by defendant's negligent misstatement concerning the plaintiff, inducing them to entertain and act upon an erroneous opinion of the plaintiff's character? In *Hanson v. Globe Newspaper Co.* (1893), 159 Mass. 293, the defendant published a

¹ *Nash v. Minnesota Title Ins. & Trust Co.* (1895), 163 Mass. 574.

² "There remains, no doubt, the argument that liability must not be indefinitely extended. But no one has proposed to abolish the general rule as to remoteness of damage, of which the importance, it is submitted, is apt to be obscured by contriving hard and fast rules in order to limit the possible combinations of the elements of liability." Pollock on Torts, 2d ed. 488, 489; in reference to liability of telegraph company to receiver of message negligently altered by the company.

statement that a criminal charge had been made against a person, who was described by name and occupation. Such description applied to the plaintiff, and to no other person. A majority of the court held that plaintiff's action for defamation could be defeated by proof that the defendant did not intend to describe the plaintiff, but used the name by mistake for that of another person. The court say that whether there should be a liability founded on negligence "is a question which does not arise on the pleadings in this case," and that, so far as they are aware, "no action for such a cause has ever been maintained." The reason for this dearth of precedent is not far to seek. In an action for the negligent speaking of defamatory words a plaintiff would be at some disadvantage as compared with his position in an ordinary action of defamation.¹ Hence the experiment of a suit for negligent utterance of defamatory language would never be attempted unless it had first been decided that a suit for defamation could not be sustained. But if the novel decision in *Hanson v. Globe Newspaper Co.* is upheld as sound law, actions for negligence will undoubtedly be brought in similar cases; and no good reason is perceived why such actions should not be sustained, provided of course that due proof of carelessness and damage is forthcoming.²

Jeremiah Smith.

¹ In an action for defamation in case of words actionable *per se*, the plaintiff would only have to prove that the defendant spoke the words. In an action for negligent utterance, he would have to prove also that the defendant acted carelessly in uttering the charge, and that damage had resulted therefrom.

² See the later Massachusetts case of *Harriott v. Plimpton*, stated *ante*, p. 192, note 3.

THE ELASTICITY OF THE CONSTITUTION.

AS the period of the formation of the American Union becomes more and more remote, it becomes constantly more important to inquire to what extent the decision of a question of federal constitutional law may properly be affected by the many changes in language, customs, morals, and in individual and national environment which have taken place since the adoption of our fundamental law. Since that time, the thirteen sparsely settled colonies strung along the border of a wilderness have become a great, powerful, and wealthy nation, second to none in culture and resources. Political opinions have changed: the doctrine of national unity has almost completely demolished its once mighty antagonist—the theory of state sovereignty. Commerce, instead of being conducted by stage-coaches and sail-boats, is carried on by railways, telegraphs, and ocean liners. Ideas of morality have changed: lotteries and duelling, once regarded as praiseworthy, are now thought pernicious and immoral. The effect of all these changes upon our system of constitutional law is surely an interesting and important matter for legal inquiry.

To a certain extent, our altered conditions and especially the Civil War have produced what may be termed a legislative alteration of the Constitution—the Thirteenth, Fourteenth, and Fifteenth Amendments. It is not the purpose of this article to discuss the influence of changes in circumstances and in popular opinion in bringing about these important amendments, or the likelihood of other amendments being carried through in the future by similar forces. Interesting as such inquiries might be, they concern the historian and the sociologist rather than the lawyer. The present paper deals with the problems which arise when a constitution, the letter of which remains unchanged, is to be applied by the courts to an altered state of facts.

The topic, therefore, is merely a branch of the science of constitutional construction, which is itself part of the still more comprehensive science of legal interpretation. The cognate topic of the construction of statutes received considerable attention at the hands of the civilians, and has been ably treated by Anglo-Saxon

writers.¹ The principles relating to statutory interpretation apply in general with equal force to the interpretation of the Constitution. Both are laws. The chief difference between them lies in the fundamental, organic character of a constitution — a *lex legum*. A constitution is designed to contain only the first principles of government; a statute, to correct any evil, great or small, which the legislature may discern in the body politic. Accordingly, statutes are passed entirely with reference to the needs of to-day; to-morrow, if conditions change, they may easily be amended or repealed. They are, therefore, construed with reference to the conditions which gave them birth and generally before those conditions have passed away. On the other hand, a constitution, being fundamental, is intended to endure through all legislative vicissitudes and statutory upheavals. To be sure, some of the recent state constitutions, with their multiplication of detail, may seem to lack somewhat of this elementary character. But the federal Constitution still retains only the framework of government; and, as the process of amendment is so tedious and difficult, bids fair to be, in form at least, as permanent as its framers intended. It is this fact which renders the present inquiry necessary. With the exception of the three amendments brought about by the Civil War, the words of the Constitution have remained unaltered since the year 1803: the conditions and surroundings of the people by whom the instrument was adopted and for whose government it provides have wonderfully changed. Is it ever possible to justify a departure from the original intention? Can the Constitution be changed, silently and without formal amendments? These are the questions to be here discussed.

The subject is, of course, a very broad one. It has to do with all portions of the field of constitutional law. Questions under the Fourteenth Amendment, questions under the interstate commerce clause, questions involving merely private rights, and vast political questions involving the whole country, — all are included. It is just such subjects which are likely to be slighted by the bench and bar. The investigation of such immense questions rarely seems necessary to the settlement of a particular litigation. It is not surprising, therefore, that little direct assistance is afforded by decided cases.

¹ Maxwell, Interpretation of Statutes; Hardcastle, Interpretation of Statutes; Potter's Dwarrior on Statutes; Sedgwick, Statutory and Constitutional Law; Endlich, Interpretation of Statutes; Bishop on Written Laws; Sutherland on Statutory Construction.

Of course, we should eliminate from the discussion any departures from principle and from the intention of the constitution-makers which have become established by repeated decision. One of the chief characteristics of the common law, in reference to which our organic law was composed,¹ is its respect for judicial precedent. Accordingly, any flagrant departure from the principle of *stare decisis*, even in order to correct an error, would do greater violence to the intention of 1789 than the mistake it was designed to remedy.²

In the same way, the result of the Civil War must be taken to be conclusive on the question of constitutional law directly in dispute. No series of decisions of the Supreme Court could establish so sacred a precedent. Rightly or wrongly, for better or for worse, the question is decided. The affair is *res judicata*. A constitutional amendment was not passed because admitted to be superfluous. However, the binding effect of the "arbitrament of arms" is confined to the precise point at issue between the contending parties. It is, therefore, dangerous to argue from the "changed relations of the States produced by the Civil War," as is not seldom done. Such arguments are vague and unsatisfactory. They appeal rather to the passions than to the understanding, and are usually advanced not as argument but as a substitute therefor. Furthermore, it is only political questions which were or could be settled by the shock of arms. Judicial questions must be determined in the court-room and not on the battlefield. When, in a purely judicial controversy between private individuals, a litigant tries to argue from "the changed relations of the States produced by the Civil War," the endeavor to bolster up a weak case is transparent. Moreover, it is generally agreed north of Mason and Dixon's Line that the war was fought to preserve and not to change the relation of the States.

In considering the effect of the multitudinous changes which have taken place since the adoption of the Constitution, it will be well first to examine the nature of such instruments, the basis upon which their authority rests, and the fundamental rules for their interpretation. All language, spoken or written, is valuable only as a more or less imperfect expression of intention. Consequently, any legal instrument—a will, a statute, or a constitution—derives its authority, not from itself, but from the intention of the testator, the legislature, or the people. At the same time, the

¹ Smith v. Alabama, 124 U. S. 465, 478.

² See *infra*, pp. 209, 210.

intention which must prevail is not that locked up in the breast, but the expressed intention. The attempt to strike the correct balance between these two opposing tendencies has produced an endless amount of litigation and of legal controversy. Two schools of opinion in relation to this question have existed from the earliest times. On the one hand is the school of strict and literal constructionists, who lay great store by the words, and are loath to look at any other evidences of intention. On the other hand is the school of broad constructionists, whose constant effort is to effectuate the actual intent in whatever way discovered. The one school would insist on construing the document according to fixed rules, and on giving to each word, so far as possible, its dictionary meaning. The other would be much more ready to construe words and phrases in a forced or ungrammatical sense, or to place upon them meanings unknown to the lexicon, in any case where the explanatory extrinsic evidence would seem so to require. The two schools differ widely as to the means to be employed in discovering the intent; but both agree—and this is the important point—that the object of all interpretation is the ascertainment thereof, and that the words derive their value solely from the evidence of intention which they furnish.¹ Consequently, if it is possible, from the instrument itself and such extrinsic evidence as the law allows, to discover the intention of the authors, such intent must prevail.² In all cases, the will of the framers of the Constitution, as discovered from the instrument itself and any legally permissible evidence in explanation thereof, is sovereign.

If this rule be not universal, where are the exceptions? What circumstances may be thought sufficient to justify a departure from the intention of the framers? Would any one maintain that the construction of the Constitution should be altered to conform to the present meaning of the words and phrases used therein? Surely, this cannot be. Changes in the meaning of words are

¹ Sedgwick, *Stat. and Const. Construction*, 2d ed. 193, 194.

The learned author shows that the authorities are agreed that "the object to be attained in the construction of statutes is the intent of the legislature," and that they differ only in regard to the means to be employed.

² "The intent is the vital part, the essence of the law." Sutherland, *Statutory Construction*, sec. 234.

"Statute law is the will of the legislature;" and "the object of all judicial interpretation of it is to determine what intention is conveyed, either expressly or by implication, by the language used, so far as it is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it." Maxwell, *Interpretation of Statutes*, 1.

entirely fortuitous. A catching comic song, the whim of a popular writer, or a thousand other purely accidental circumstances may affect the signification of words far older than the Constitution. It cannot be that the fundamental law of the land is subject to variation with every such passing fashion. Otherwise, the interpretation of the Constitution would be the sport of chance and as variable as fortune herself. For example, to take an extreme case, the Constitution vests in Congress the power of regulating commerce with the "Indian tribes." Suppose, in the course of time, "Indian tribes" should cease to denote the aboriginal inhabitants of America, and should come to be applied, by the universal sanction of the best usage, to some other class of the population, say, the negroes. Would Congress thereby acquire the right to regulate commerce between whites and blacks? No one would support so preposterous a proposition. If any such doctrine were upheld, our supposedly stable government would be liable to changes as uncertain as the caprice of an Eastern despot. In whatever ways, then, the interpretation of the Constitution may vary, it clearly must be independent of any mere changes in language.¹

Perhaps, the most plausible ground for violating the intention of the framers is to be found in considerations of expediency. To follow out precisely in all cases the will of men who lived over a century ago may, in certain contingencies, from the standpoint of policy, be extremely undesirable. The argument is specious that the Constitution, which was designed to be permanent, under the stress of such exigencies, ought to prove elastic and adaptable to changed conditions; that, although the intention of the framers should, theoretically perhaps, always be carried out, yet they could never have intended that an instrument which was to endure through all time should always bear the same construction. But this fact, that constitutional restrictions on the legislative, executive, and judicial departments may unduly hamper the government, is an argument in favor of the English system of the omnipotence of the legislature.² It cannot warrant the judicial alteration of the Constitution.³ Any department possessing the power of

¹ Chief Justice Taney said in the *Passenger Cases*, 7 How. 283, 478: "If in this court we are at liberty to give old words new meanings when we find them in the Constitution, there is no power which may not, by this mode of construction, be conferred on the general government and denied to the States;" or, it may be added, denied to the general government and conferred on the States. Cf. Vattel's Ninth Rule, Potter's *Dwarris on Statutes*, p. 127; Smith, *Statutes and Const. Law*, sec. 482.

² 1 Hare, *Am. Const. Law*, 214, 215.

³ 1 Story on the Constitution, sec. 426.

altering the construction of the supreme law of the land would be above the Constitution ; and the possession of such power by the courts would be far more dangerous than the right which they have sometimes claimed of annulling legislation which, although not forbidden by any constitutional provision, is yet deemed by the judges contrary to the "first principles of natural justice." The existence of this latter power, although often asserted, is yet by those who have given much thought to the matter generally denied.¹ Nevertheless, such a veto over unwise acts of the legislature is much less dangerous than a similar control over the Constitution itself whenever the emergency may by the courts be thought sufficiently urgent. Accordingly, it is clear, not only that the original intention must prevail wherever discoverable, but also that the intention of the framers was that their words should be applied in their reasonable and proper construction to all cases and circumstances that might in the future arise.

Indeed, this proposition, clearly stated, must command universal assent. Accordingly, those who at heart advocate a contrary doctrine evade and attempt to befog the issue. They resort to high-sounding platitudes, and veil their contentions in sonorous metaphors. The Constitution, they say, is not dead but living. The life of the American people is pulsing through its dry, legal phraseology. "A Constitution which resembles a Chinese shoe can suit only a nation which has sunk into Chinese inertia." Our Constitution is no mere skeleton ; it is a living, growing organism, capable of adapting itself to all the multiplex conditions in which the nation may be involved. All these figures of speech, if understood aright, no doubt express a truth ; but they are more calculated to mislead than assist. Far better is it to recognize plainly that the intent of the framers must forever be followed, however expedient may appear a departure therefrom. Otherwise, the Constitution is not a law but a mere moral precept. There is no middle ground. If it be permissible to "bend," to "stretch," or "adapt" the Constitution even in the most minute details, the same authority may abrogate the plainest, broadest, and most fundamental of its provisions.²

Of course, the argument *ab inconvenienti* has its proper place in constitutional law. The men who composed the Federal Conven-

¹ Cooley, *Const. Lims.* *200 *et seq.*

² Potter's *Dwarris on Statutes*, 664-66, contains a brief but admirable discussion of this question.

tion of 1787 were wise and far-seeing statesmen; and the fact that this or that construction of their words would produce unfortunate results is potent to show that they never entertained the intention sought to be imputed to them. Again and again, the Supreme Court have acted on this argument. Influenced thereby, they have created exceptions to general and sweeping provisions.¹ They have even overruled prior decisions where the inconveniences to which they would lead have been clearly demonstrated.² But, in all cases, they have merely used the unfortunate consequences of this or the other decision as a basis of inference in order to discover the original intention, and never as a warrant for disregarding such intent.³ This distinction between the correct and the incorrect uses of the argument from expediency is, in practice, so difficult to maintain that doubtless not even the Supreme Court has been infallible in this respect. However, while, in isolated cases, errors in administration have been committed, the judges have never consciously departed from sound principle. They have always declared their opinion that, the original intention being once established, the consequences, however disastrous, do not concern the judiciary.⁴

It follows from this doctrine that wherever considerations of expediency afford no evidence of the original intention, they are irrelevant, and can be entitled to no weight on questions of constitutional law. Thus, where one construction of the Constitution would have been desirable and politic at the time of its adoption, and another at the present day, the former fact, as above stated, justifies an inference as to the original intention, and is, therefore, of great assistance in determining constitutional questions; but the latter clearly is of no such evidential value, and should be altogether disregarded. This is of great theoretical importance at the present time: for the old shackles may prove exceedingly embarrassing now that the United States seem to be entering upon a new sphere of activity and are surrounded by circumstances which even ten years ago were totally unforeseen. Already the argument

¹ *Stone v. Mississippi*, 101 U. S. 814. But see 1 Story on the Constitution, sec. 427.

² Cf. *Hans v. Louisiana*, 134 U. S. 1; *The Propellor Genesee Chief v. Fitzhugh*, 12 How. 443.

³ *Sturgess v. Crowninshield*, 4 Wheat. 122, 202, 203.

⁴ For example, Chief Justice Marshall, after arguing that the framers could not have intended to subject the federal government to all the embarrassments which would result, he thought, from its inability to establish a national bank, added: "If, indeed, such be the mandate of the Constitution, we have only to obey." *McCulloch v. Maryland*, 4 Wheat. 316, 408.

is being advanced that the Constitution must be bent from its original meaning to suit present exigencies. Not only, as we have seen,¹ is this "bending" process inadmissible from the standpoint of the lawyer; but these facts of merely present expediency, arising wholly out of novel and unexpected events, should be entirely disregarded in construing the Constitution. At all events, this is so where, excluding these facts of present expediency, the original intention appears reasonably clear. What is to be done where the original intent is indiscoverable is best reserved for future consideration.²

As has been said above, it must be admitted that this doctrine, in certain crises, may seriously hamper the operations of the government, and certain decisions of the Supreme Court have had precisely that effect.³ That such occasions are so rare is due to the wisdom and foresight of Washington, Madison, Hamilton, and their compatriots: for the inconveniences in question are the necessary consequence of the enforcement by the courts of a written constitution. Admirers of our system of constitutional government are obliged to admit this evil, and are forced to the position that the corresponding advantages of a fixed organic law more than compensate therefor. If ease of alteration to suit the needs of the hour be thought desirable, we must establish an entirely new scheme of government.

Closely akin to this heresy that the Constitution may be judicially altered to suit ephemeral conditions lies the notion that where an error has become inveterate through long-established usage and the opinion of the legislature and executive departments, the courts are powerless to interfere. Of course, the decision of the legislature or executive is always entitled to great deference, and is absolutely binding wherever the question is held to be of a political nature and therefore unsuited for judicial determination.⁴ This class of cases affords no authority, however, for an abdication by the courts of their proper functions in non-political controversies merely because Congress or the President has been acting on an erroneous interpretation of the Constitution. To accord such importance to legislative or judicial precedent differs widely from a submission to the authority of decided cases. The latter, as above shown,⁵ is justified by the great regard paid by the common law

¹ *Supra*, p. 205.

² See *infra*, pp. 215, 216.

³ *E. g.* *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601.

⁴ *Luther v. Borden*, 7 How. 1; *Georgia v. Stanton*, 6 Wall. 50.

⁵ *Supra*, p. 202.

to prior adjudications. But that system of jurisprudence attached by no means the same importance to the *dicta*, however elaborate and well considered, of judges and learned text-writers, or to the opinions, even when acted upon, of the unlearned laymen who may happen to occupy important legislative or executive offices. Of course, the adoption by some prominent official of this or that construction of the Constitution, and the acquiescence therein by the people, are valuable evidence of the meaning of the framers; but these facts would seem to furnish no excuse for a refusal by the courts to exercise their prerogative of annulling legislation which, in their opinion, is contrary to the true interpretation of the Constitution.

A very similar question arises in reference to the construction of statutes; and, upon that subject, it is held that "the understanding and application" of the statute when it "first comes into operation, sanctioned by a long acquiescence on the part of the legislature and the judicial tribunals, is the strongest evidence that it has been rightly explained in practice."¹ This is so because "those who lived at or near the time when it was passed may reasonably be supposed to be better acquainted than their descendants with the circumstances to which it had relation as well as to the sense then attached to legislative expressions."² It may be that some cases go further; and, giving a more than evidential value to such usage, even treat it as precluding the court from investigating the question *de novo*. This, however, seems to be giving undue weight to such considerations; and both on principle and by the preponderance of authority,³ where it is possible to discern the legislature's intent, even long-established custom, if in conflict therewith, must be overruled. Thus, Lord Ellenborough observed, "It has been sometimes said, *communis error facit jus*; but I say *communis opinio* is evidence of what the law is."⁴ So, in *United States v. Dixon*,⁵ Judge Story, speaking for the Supreme Court, said: "The construction given by the treasury department to any law affecting its arrangements and concerns is certainly entitled to great respect. Still, however, if it is not in conformity to the true

¹ *Packard v. Richardson*, 17 Mass. 121, 143.

² Maxwell, *Interpretation of Statutes*, 2d ed. p. 367.

³ *Greely v. Thompson*, 10 How. 225; *U. S. v. Graham*, 110 U. S. 219; *Herbert v. Purchas*, L. R. 3 C. P. 605, 650 (*semble*).

⁴ *Isherwood v. Oldknow*, 3 M. & S. 396. See, also, *Broom's Legal Maxims*, 2d ed. p. 104.

⁵ 15 Pet. 141, 161.

intendment and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice."

At all events, whatever may be the true doctrine in regard to statutory construction, the case is very different where a constitution, and above all the federal Constitution, is concerned. The consequences of an error are so much more serious. In the case of a statute, it may perhaps be thought better to leave to the legislature the correction of a misinterpretation of its words, if the error be sanctioned by well-settled custom. But the case of the Constitution is different. There is no assembly with frequent sessions representing the sovereignty of the people of the American States, to which the courts may refer the correction of an established error. A constitutional amendment is so remote a possibility as scarcely to be worth consideration. The judiciary must decide between the perpetuation of the error and the overthrow of the usage. Would any judge hesitate which horn of this dilemma to choose? If the question be conceded to be doubtful where the construction of a mere statute is concerned, surely in regard to the Constitution, where the reasons for repudiating an error are so much stronger, no room exists for hesitancy.¹

Indeed, so important is the establishment of the correct construction of the Constitution that even the authority of previous judicial decisions has been thought insufficient to justify a departure from the true intent and meaning of the instrument. Thus, Chief Justice Taney, in a case relating to the power of the States over interstate commerce,² said: "I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to be founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." While this advanced position would prove in practice very inconvenient and has in fact been long since repudiated, still, even at the present day, many lawyers would agree with Mr. Justice Miller when he declares:³ "With as full respect for the authority of former decisions as belongs, from teaching and habit, to judges trained in the

¹ See *Cooley, Const. Lims.* *66 *et seq.*

² *Passenger Cases*, 7 How. 283, 470.

³ *Washington University v. Rouse*, 8 Wall. 441, 444.

common law system of jurisprudence, we think there may be questions touching the powers of legislative bodies which can never be closed by the decisions of a court." Without adopting the radical views of Taney, or even the more conservative opinions of Miller, all must concede that constitutional cases are overruled more frequently and with less compunction than decisions establishing a rule of property or laying down some principle to be acted upon in mercantile transactions, or, indeed, than cases upon any other branch of the law.¹ A glance at the list of overruled cases in the reports of the Supreme Court,² especially at the oscillations of that tribunal upon the subject of interstate commerce,³ is sufficient to establish this proposition. If, then, the weight of decided cases is relatively so slight, if the fundamental common law principle of *stare decisis* is given no more consideration, surely the mere practice of administrative officers, which unquestionably deserves less attention, should never be allowed to override the intent of the framers, although, indeed, it may properly control in cases of irremovable ambiguity.

It is well here to reiterate that the opinions of government officials, acted upon and put into practice, especially if they date from a time nearly contemporaneous with the adoption of the Constitution and have been constantly acquiesced in, are entitled to great evidential weight in endeavoring to arrive at the meaning of the framers. For they show the opinions of those best qualified to know the original intention. Thus, in *Stewart v. Laird*,⁴ upon a question of constitutional law, the court said: "Practice and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a con-

¹ *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, 579.

The weight to be given to precedent was ably emphasized in the opinions of the dissenting judges. 157 U. S. 636-639, 650-652, per White, J.; 158 U. S. 663, per Harlan, J.; 158 U. S. 689-691, per Brown, J. The majority of the court apparently felt little difficulty in disregarding "a century of error."

² *E.g.* *Chisholm v. Georgia*, 2 Dall. 419; *Davidson v. New Orleans*, 96 U. S. 97; *State Tax on Foreign-Held Bonds*, 15 Wall. 300; *Hepburn v. Griswold*, 8 Wall. 603; *Springer v. U. S.*, 102 U. S. 586; *The Thomas Jefferson*, 10 Wheat. 428.

³ Compare *N. Y. v. Miln*, 11 Pet. 102, with the *Passenger Cases*, 7 How. 283; *The License Cases*, 5 How. 504, with *Leisy v. Hardin*, 135 U. S. 100; *Plumly v. Mass.*, 155 U. S. 461, with *Schollenberger v. Pennsylvania*, 171 U. S. 1; *Peik v. Chicago, etc. Ry.*, 94 U. S. 164, with *Wabash, etc. Ry. Co. v. Illinois*, 118 U. S. 557; *Hall v. DeCuir*, 95 U. S. 485, with *Louisville, etc. Ry. Co. v. Miss.*, 133 U. S. 587.

⁴ 1 Cranch, 309.

temporary interpretation of the most forcible nature." ¹ In this connection, it is important to note that great stress is here and uniformly laid upon the contemporaneous character of the usage.² A merely modern practice would, of course, be of much less value as evidence, and might in many cases deserve scant courtesy.

The objection may be raised that the whole of the foregoing argument in favor of the sovereignty of the original intent proceeds on the assumption, first, that the language of the Constitution is the language of the Constitutional Convention, whereas, in theory at least, it is the language of the American people; and, secondly, that all the members of the Constitutional Convention entertained the same intent and understood the Constitution in the same way, whereas in fact they differed widely in regard to those matters. This objection, while unquestionably founded on substantial difficulties, is really not germane to the present subject. For the present purpose, it would be sufficient to state that the intention of some person or persons, real or imaginary, living at the close of the eighteenth century, must prevail — the intention, perhaps, of the reasonable man of that period. But after all, the matter is but little more complicated than the interpretation of a statute, which is theoretically the language of the hundred or more members of the two houses of the legislature. In every case, the important point is the expressed intention. In all cases, the declarations of individual members of the legislature, of the convention, of the people at large, if admissible at all, are received merely as evidencing the intention which the words, construed in the light of the surrounding circumstances, reasonably express. This intent it is which must control. No better evidence thereof could be found than the unanimous opinions of the framers themselves. They were fully imbued with the "spirit of the Constitution." They knew better than any one else the purpose of each clause thereof. And they were as well acquainted as anybody with the English language as then used. Unless, therefore, by some curious slip, they have utterly failed by their language to express the intent which their declarations or actions show them to have entertained, their construction of the instrument is practically conclusive evidence of the interpretation which should to-day be adopted.

Excluding, then, cases covered by the doctrine of *stare decisis*

¹ See, also, *The Laura*, 114 U. S. 411.

² "*Contemporanea expositio est optima et fortissima in lege.*" 2 Inst. 11. Smith on Statute and Constitutional Law, chap. xiii.

or by the result of the Civil War, we may lay down this universal and cardinal rule of constitutional law, — the intent of the framers, if ascertainable, must in all cases prevail, provided the words be deemed an adequate expression thereof.

Although this proposition is, upon analysis, readily seen to be impregnable, yet many even of the most learned constitutional lawyers frequently overlook, rather than intentionally disregard, its truth and applicability. If the matter were specifically called to their attention, few of them would deny the soundness of the proposition in question, and almost all of them would acknowledge their own inadvertent errors. Consequently, such statements, of which many are to be found among the utterances of politicians and some within the covers of law treatises,¹ should not be accepted as weighty authority, but should be accorded only such slight deference as is warranted by their nature as *obiter dicta*, by the evident thoughtlessness with which they were spoken, and by the absence of any sound reason upon which to support them.

Before discussing cases where the intent of the framers is indiscoverable, it is important to note that many cases which were not and could not have been specifically in the minds of the framers were really covered by their general concepts, and are, therefore, in a true sense included within their actual intention. For example, the word "commerce" to the men of 1789 denoted in particular those special forms of intercourse with which they were familiar — the stage-coach and the sail-boat. But from these individual instances they had formed a broad and general concept including at least all conceivable means — whether at that time known or unknown — by which commodities might be bought, sold, and exchanged. When, therefore, the steamboat and the locomotive were invented, those forms of intercourse were held, and of course properly held, to be included within the term "commerce" as used in the Constitution. In so declaring, the courts merely passed upon the limits of the conception of commerce as it existed in the minds of the framers of the Constitution. That these statesmen are thus judicially declared to have meant what they never heard of is only an apparent absurdity. Indeed, the same paradox is frequently illustrated in everyday life, and is necessarily incidental to the use of generic terms. For example, when we say, "All men are mortal," do we not mean to predicate the fact of each and every individual of all the countless myriads of human

¹ 1 Story on Const. sec. 425; Mason, Von Holst's Const. Law of U. S. sec. 1.

beings, even those yet unborn and those of whose existence we are totally unconscious? So, when it is said, "All trees belong to the vegetable kingdom," the banyan of India and the sequoia of California are clearly included, although the speaker may never have heard of those varieties.

It is important to grasp this notion of the comprehensiveness of general terms, not only in order to avoid a departure from the original meaning of such words, but also in order to obviate the possibility of an erroneous inference from decisions holding the words of the Constitution applicable to newly arising conditions. For example, it is sometimes thought that the cases holding railway and telegraphic communication to be "commerce" show that the Constitution is altering and growing to keep pace with modern meanings of its words and with modern economic conditions. But the meaning of commerce has not changed.¹ It is the same to-day as in the eighteenth century. Nor did the courts in these cases yield to considerations of expediency. They were called upon merely to define the limits of the conception of commerce as it existed in the minds of the framers; and if this could be done with perfect accuracy, it would be easy to determine whether a given case falls therein. However, while the fixing of exact boundaries for the shadowy conception which the men of 1789 designated by such a word as commerce is indeed difficult and often impossible, the attempt to do so is never irrational, and may without absurdity lead to the declaration that the wide though indefinite territory included within such terms embraces many things which never occurred to those whose language is being construed.

An excellent example of the class of cases just mentioned is furnished by the interpretation of the clause granting admiralty and maritime jurisdiction to the United States. The question arose whether this jurisdiction covered only those waters within the ebb and flow of the tide, as was the English rule, or whether it extended to the Great Lakes and vast navigable rivers of the West.

¹ "Constitutional provisions do not change, but their operation extends to new matters as the modes of life and habits of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon and on water by canal-boat and sailing-vessel, yet in its actual operation it touches and regulates transportation by modes then unknown. Just so it is with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of intercourse unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop." Per Brewer, J., *In re Debs*, 158 U. S. 564, 590.

The answer to be given depended on the intent and meaning of those who formed the Constitution. Evidently, the framers of the instrument had been thinking chiefly and particularly of the ocean and of the comparatively small rivers and bays of the Atlantic coast, in which the ebb and flow of the tide is a tolerably accurate test of navigability. They did not have specifically in mind the great Western rivers and lakes, which were then little known, and on which no commerce was transacted. The question, therefore, resolved itself into this: Did the framers conceive of the waters covered by admiralty jurisdiction as comprising only those within the ebb and flow of the tide, or did they entertain a broader conception, of which the navigable waters of England and the Atlantic States, roughly determined by the ebb and flow of the tide, were merely examples? If they held the former view, the fact that reason, justice, and expediency demanded an extension of the jurisdiction would not justify a court in applying a broader definition than the framers had in mind. It would not have sufficed even to show that, if they had been reminded of the great inland seas and rivers, they would so have extended their language as clearly to have embraced them. It had to be proved that such waters actually were covered by the words and meaning of the Constitution; that the authors thereof did not regard the tidal character of the water as the absolute criterion of maritime jurisdiction, but looked upon it merely as a handy rule to be applied only where, as in England and the Atlantic States, the ebb and flow of the tide is the approximate limit of navigation. This was the view of the framers' meaning which the Supreme Court finally adopted.¹ Whether, as an original question, their decision was correct is certainly open to much doubt, but it is clear that, assuming the original intention to have been as they concluded, the great navigable rivers of the West, while not specifically in the minds of the framers as subject to the jurisdiction of admiralty, were yet actually covered by their general concepts.²

¹ The *Genesee Chief v. Fitzhugh*, 12 How. 443 (overruling *The Thomas Jefferson*, 10 Wheat. 428).

² From the decision in *Genesee Chief v. Fitzhugh*, *supra*, Mr. Justice Daniel vigorously dissented. He thought that the ebb and flow of the tide was deemed by the framers the ultimate extent of admiralty jurisdiction, and that the Supreme Court, in overruling their earlier decision, were claiming for themselves, "wholly irrespective either of the Constitution or the legislation of Congress, powers to be assumed and carried into execution by some rule which in the judgment of this court is to be applied according to its own opinions of convenience or necessity." 12 How. 464. If this had been a correct statement of the majority's position, the dissent would have

But after making all due allowance for these cases, which are in reality, though not apparently, within the actual intention of the Constitution makers, of course it often happens that the meaning of the framers cannot be ascertained. The imperfection and vagueness of human language, the difficulty of placing ourselves in the position of men who lived so long ago—these and many other causes explain the many doubts and uncertainties in which the interpreter of the Constitution finds himself involved. The present paper is only incidentally concerned with the general inquiry of what is to be done under such circumstances. The only question which is really a part of the present subject is how far the decision in such cases may properly be influenced by the changes which have taken place since the adoption of the Constitution. Upon the general question it is sufficient to say that when insoluble doubts arise, rules of construction—rules of positive law—come into play. Thus, we have the rule that powers not expressly or impliedly granted to the general government are reserved to the States; that the sovereign is not ordinarily to be construed as covered by general words; that penal provisions are to be strictly construed; that the court will presume in favor of established practice, and so on. The precise application of these rules of positive law is obscured by the fact that all of them are founded in reason and aim at upholding the probable intention. At the same time, they are now more than rules of logic, and have crystallized into rigid rules of law. Thus, as above shown, long-continued executive or administrative usage is evidence, and often very cogent evidence, of the original intention: but if, after giving all due weight to this and other probative matter, the court still deems the actual intent doubtful, the force of the usage as evidence is exhausted; but its effect under the rules of positive law is then for the first time felt. Then, and not till then, does the doctrine properly apply that in doubtful cases the practical construction of those to whom the enforcement of the law is intrusted shall control. These rules of construction are not to be allowed to defeat the actual intent; but the presumption which they raise is not overthrown merely by showing that, all things considered, the intent of the legislature, or of the people, is doubtful. Indeed, it is in such cases that the “presumption” has its only real operation.

been amply justified. But it is a clear misapprehension; for the opinion of the court advances no such claim. The case proceeds not upon any such pretensions, but wholly on a different view as to the actual meaning of the framers.

In the application of these rules of construction, in the nature of things, the changes which have taken place since the adoption of the Constitution can, in general, play but little part. But suppose the circumstances to which one of these rules attaches its consequences have originated in modern times, long after the adoption of the Constitution. For example, in doubtful cases, the court will incline against a construction which is productive of inconvenient results.¹ Now, suppose one construction would have been desirable from the standpoint of policy at the time the Constitution was adopted, and another at the present day. Towards which interpretation does the rule above stated require the court to incline? As above shown, the origin of all such rules is the probability that by enforcing them the court will arrive at the actual intention. But facts of merely modern expediency can furnish no basis of inference as to the meaning of the framers; and, therefore, the reason of the rule ceasing, the rule itself should give way. All analogy is against yielding, even in doubtful cases, to the present inconvenient consequences of a construction which in the earlier years of the republic would have been free from any such objection. To hold otherwise would permit a different construction of the Constitution from that which would have been adopted if the court had been sitting soon after the formation of the Union. In the writer's judgment, such a course should never be followed. Opinions upon the question may, however, fairly differ; and, no doubt, the opposite view would not lack strenuous supporters. Indeed, as the case is one where, *ex hypothesi*, the actual intent of the framers is undiscoverable, all reasoning concerning it is somewhat unsatisfactory. Moreover, the matter is of less practical than theoretical importance, because, whatever may be a judge's opinion upon the abstract question, his decision will almost inevitably be unconsciously influenced by his knowledge of the immediate ill effects which a theoretically correct judgment might produce. The reason, therefore, for insisting on what seems to the writer to be the true view is rather to round out a theory than to attain a practical result.

Arthur W. Machen, Jr.

¹ *Gibbons v. Ogden*, 9 Wheat. 1, 188, 189.

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THE LAW SCHOOL. — After thirty years of continuous service Professor Langdell has resigned from the Faculty of the Law School, becoming a Professor Emeritus. A desire to devote all of his time to writing has prompted this move. It is needless to say that he will be greatly missed. For a generation he has given to this school the best of his energy and genius; and it is chiefly to his initiative that the preëminence of the Harvard Law School can be ascribed. Here the "case system" of studying law was originated — the invention of Professor Langdell — and here it was first put into practice. This was the first law school to suggest that its students should be college graduates and to make that suggestion a reality. These far-reaching principles are the fruits of Professor Langdell's genius: their consummation is, in the main, the result of his foresight, energy, and perseverance.

There are this year, as usual, some changes in the curriculum of the school. In consequence of Professor Langdell's retirement, Equity II. has been omitted this year. Equity III. is in charge of Professor Ames and has been thrown open to second year students. Carriers and Admiralty have been separated, and each is to be a half course, the latter under Professor Ames. Two new extra courses are given, Civil Law of Spain and the Spanish Colonies, by Professor Strobel, and Administrative Law, by Mr. Wyman, LL. B. 1900. Roman Law, Patent Law, and the Interpretation of Statutes are as last year omitted. So also is Massachusetts Practice, in the place of which the course on the New York Code is to be given by Mr. Rounds. The work of Property I. and Property II. is divided between Professor Gray and Assistant Professor Westengard. Professor Williston and Mr. Dodge, who in former years taught in the School, are together giving first year contracts. Mr. Peabody, LL. B. 1898, is assisting Professor Beale in Criminal Law. Pro-

fessor Williston has resumed charge of Sales, and Professor Brannan is giving Damages. All first year and several second year courses are now divided into sections, a practice which has been greatly developed during the last few years. The present entering class is about the same size as that of last year. The total registration in the School is somewhat larger than formerly. Full statistics will appear in the December number.

THE GOVERNORSHIP OF KENTUCKY. — The consequences of the dismissal by the Supreme Court of the United States of the case of *Taylor v. Beckham*, 20 Sup. Ct. Rep. 890, for want of jurisdiction, are far-reaching, as well by reason of the political significance of the judgment, as because of the importance of a legal question involved. The election laws of Kentucky provided that all contested elections were to be tried by a committee chosen by lot from the members of the legislature, who should hear the evidence and report to the legislature, which body should determine the contest. The State Board of Election Commissioners having declared Taylor elected to the office of governor, Goebel, and at his death Beckham, contested the election. A contest board, chosen according to the forms of the law, — but fraudulently, as Taylor alleged, — heard the evidence, and reported in favor of Beckham. The legislature, without demanding the evidence, accepted this report as it stood and adjudged in favor of Beckham. Upon Taylor's refusal to surrender the perquisites of the office, Beckham brought *quo warranto* proceedings in the State Court, and obtained a judgment of ouster. Taylor then appealed and urged, among other things, that there had been fraud in the choice of the contest board, and that the legislature in accepting the report of that board acted without evidence and arbitrarily. The Kentucky Court of Appeals sustained the judgment on the grounds that the court could not question the validity of the legislature's record of the proceedings, and that the case did not come within the Fourteenth Amendment, as the office of governor was purely political and not property. Upon this latter point error was brought to the Supreme Court of the United States, where the case was dismissed for want of jurisdiction, the majority of the court holding that the right to a public office of a state was not protected by the Fourteenth Amendment. Mr. Justice Brewer, with whom concurred Mr. Justice Brown, while holding that a public office was property, nevertheless found due process of law in the fact that the forms of the election law had been complied with, and so concurred in the result. Mr. Justice Harlan, however, dissented strongly, and went so far as to say that the removal of Taylor from office was a deprivation, according to the Fourteenth Amendment, not only of property but of liberty as well — the latter word meaning political freedom as well as protection from mere physical restraint; and that in determining what was due process of law regard must be had to substance and not merely to form.

Whether a public office may be considered as property within the Fourteenth Amendment seems never before to have been squarely decided in the Supreme Court. For the earlier Federal cases holding an office not to be property, *Butler v. Pennsylvania*, 10 How. 402, appear to have been disregarded of late years. In fact there are several decisions where the affirmative of this question seems to have been assumed, — and

on such the dissenting opinions rely strongly, — but in almost all of them the finding that there had been due process of law rendered unnecessary the determination of the principal question. *Wilson v. North Carolina*, 169 U. S. 586. In the present case, however, the court declined to take jurisdiction expressly on the ground that the right to a public office was not such a proprietary right as could claim the benefit of the Fourteenth Amendment. Moreover, whether or not there was “due process” is no more than touched upon by the Chief Justice in the majority opinion. The case would therefore seem to stand as a direct decision on the point.

State authorities on the matter are in conflict. In North Carolina it is held that although for good reason the legislature may abolish an office, or reduce the salary of the incumbent, it may not arbitrarily, and without just compensation, displace A merely to install B in his place, since A has a vested right in the office. *Hoke v. Henderson*, 15 N. C. 31. The more common view is that a public office is in no respects property, but a mere agency or trust of the State, with which the State may deal as it pleases. *Conner v. Mayor, etc. of New York*, 5 N. Y. 285. Blackstone includes an office in his list of incorporeal hereditaments, and says that the term may be in fee, for life, or for years. 2 Bl. 36. In this country it is undoubted that a political office can never be held in fee, and it can hardly be considered as capable of absolute tenure for life or for years, since, as is universally held, the legislature may, in the absence of an express constitutional limitation, abolish or shorten the term of such office, or reduce the salary of the incumbent, without furnishing any compensation. This power, according to those who contend that an office is property, is put on grounds of public policy. The Supreme Court seems to have acted wisely in adopting the more general view, and in finally clearing away from a practical question the cobwebs of antiquated law.

THE LEGALITY OF STRIKES. — A recent decision by the Massachusetts court is of interest, as showing the practical difficulties in applying the doctrine that malicious interference with business is wrongful. In *Vege-lahn v. Guntner*, 167 Mass. 92, “picketing” was held to be illegal. 10 HARVARD LAW REVIEW, 301. The court has recently decided that, in some cases, a labor union will be restrained from threatening to strike. *Plant v. Woods*, 57 N. E. Rep. 1011 (Mass.). In this case, the defendant union conspiring to force the plaintiffs, members of a rival union, to join their organization, intimated to the plaintiff’s employer that unless the plaintiffs did so join or were discharged from their employment, strikes would be declared against him. The court held this action to be unjustifiable intimidation and granted an injunction restraining its continuance.

The same court has already decided that a combination is justified in taking steps to strengthen its organization at the expense of others. *Bowen v. Matheson*, 14 Allen, 499. Hence the obvious inference is, that motive alone does not determine the justification. In the principal case, the court finds an added element in that their threat meant more than a withdrawal. It meant that a refusal would be followed not only by a strike but also by the violence and annoying conduct which usually accompany strikes. Although this conduct may not be sanctioned by

the defendants, yet when they threaten to give the signal, they avail themselves of all the fear and coercion which these results call to mind. Such means, the court holds, will not be justified by the motive.

The practical result of this decision is, in some cases, to deprive organized labor of its most effectual weapon, and the question arises, how far will this be carried? If unions are deprived of these methods of securing redress for their grievances, it means that all strikes will be illegal. The court would not be willing, probably, to go to that length, and the decision is carefully limited to attempts to strengthen an organization by killing off its rivals. The majority seems to feel that there is a distinction between the final purpose of benefiting themselves individually and the preliminary purpose of better organization. They look on both as in the field of legitimate competition, but they do not think it policy to allow the union to use the same forceful means for increasing its strength as for the obtaining of higher wages. On this very question the court is divided. Chief Justice Holmes can see no reason why public policy should be more favorable to the one purpose than to the other. Considering the difficulties encountered by the court in the principal case, and the narrow technicalities on which the decision is based, it may well be doubted whether the departure of the Massachusetts court from the doctrine of *Allen v. Flood* is wise.

SELF-ACCUSATION AND DOUBLE JEOPARDY. — Where proceedings before a justice of the peace were due solely to the defendant's self-accusation, the resulting conviction was held, in a recent case, to be invalid, *De Bord v. People*, 61 Pac. Rep. 599 (Colo.). The defendant, having committed an assault, went before a justice, apparently without fraudulent intent, and swore to a complaint charging himself with the offence, whereupon the justice sentenced him to pay a fine of three dollars. Shortly afterwards the assaulted party swore out a complaint before another justice, and the defendant was brought before this second magistrate, and his plea of former conviction being overruled, he was fined five dollars. On appeal this ruling was approved.

It is difficult to see on what principle the decision can be supported. The plea of *autrefois acquit* rests on the rule that no one shall be twice put in jeopardy for the same offence. Such a plea is, therefore, invalid, where the defendant's previous conviction has been brought about by collusion with the justice, for, since such a defendant in fact controlled the proceedings, and could produce whatever result he pleased, he was never in any true jeopardy. But fraud which did not have this result ought not to vitiate a conviction. If it consisted in the defendant's bribing the accusing party, or in accusing himself with the intention of barring a subsequent prosecution, which he feared might prove more severe, he cannot be said, provided he did not collude with the justice, to have controlled the outcome of affairs. He, therefore, came into true jeopardy, that is in the danger of punishment which was not merely self-inflicted, and his conviction should be held a valid bar. The courts, however, not recognizing the true ground on which fraud may vitiate a proceeding, have confused these two classes of cases, and, whenever the point has arisen, have maintained the doctrine that fraud of any kind makes a conviction void. *State v. Dascom*, 111 Mass. 404.

A few courts have adopted the still less tenable rule of the principal case, that a conviction by a justice of the peace, at the plaintiff's instigation, is always void. *Bradley v. State*, 32 Ark. 723. Support has been found for this doctrine in an early Massachusetts case, *Commonwealth v. Alderman*, 4 Mass. 477. Though in the meagre report no fraud appears to have been alleged, it is highly probable that it did exist and that the unnamed case the court affected to follow was also based on the same ground. The feeling that a self-accuser must be fraudulent has doubtless also been largely responsible for this result. But fraud as above shown need not necessarily vitiate a proceeding. Moreover, it is obvious that a wrong doer, knowing himself to be liable to a fine, might in good faith confess his fault to a justice and suffer his punishment. In such a case, and such in default of any evidence to the contrary, we must assume the principal case to be, to hold the defendant's conviction void would be extreme injustice. If self-accusation gives too great an opportunity for fraudulent collusion, it should be regulated by statute. Thus, except for the authority of a few recent cases, themselves based on the uncertain authority of *Commonwealth v. Alderman*, *supra*, the principal case is entirely without support.

LAND BOUNDED BY AN INTENDED STREET.—An interesting question of boundaries is discussed in *Graham v. Stern*, 64 N. Y. Supp. 728 (Sup. Ct. App. Div., First Dept.). In 1804, the city of New York, owning certain common lands, granted to the plaintiff's predecessor in title a lot bounded on one of its sides "by a street sixty feet in breadth." This street had been designated on a map, but as a matter of fact was never opened. It was held, that the grant extended only to the side of the street, not to its centre.

The general rule is that a deed of land bounded "by" a way carries the soil of the grantor *usque ad medium filum viæ*. This rule is based on sound public policy. The strip of land is of little use to the grantor except for the purposes of extortion; while it may be of distinct value to the grantee, not only in case the way is moved or closed, but to give him the power to protect his rights as an abutter against a wrongful user of the way. These reasons apply with equal force in case of an intended way, not yet laid out, and though there is much difference of opinion, it seems better to make no distinction between existing and unopened ways. *Bissell v. New York Central Railroad Company*, 23 N. Y. 61. It is of course possible expressly to exclude the road from the operation of the deed, but by the better view the general rule is applied except where it would do manifest violence to the express words of the deed, or to its intent in the light of the circumstances surrounding the grant. Thus, mere mention of the side, or reference to measurements, to monuments, or to a map which would not include the way, are not sufficient to prevent its passing under the deed. *Berridge v. Ward*, 10 C. B., N. S. 400; *Cox v. Freedley*, 33 Pa. St. 124.

In the principal case the decision is based on two grounds. In the first place, by statute in 1793, the fee of all streets in New York city was transferred to the city corporation, and the legal title of all streets since opened has been held to vest at once in the city. The court, therefore, argued that the unlikelihood that the city would grant out what it would have to buy back when the street should be opened was a circumstance

which sufficiently showed that the fee of the street was not intended to pass under the deed. Yet in view of the extent to which the general rule is applied, this fact does not seem adequate to prevent its application here. The street might never be opened, as indeed was the fact in the principal case; or it might have been intended that the grantee should enjoy the use of the land until the street should be opened. The court further bases its opinion on the old New York city street cases, which held that the general rule did not apply to unopened streets in the city of New York. *In re Seventeenth Street*, 1 Wend. 262. These cases, admittedly applying a different rule in New York city from that prevailing in the rest of the state, have been severely criticised (see *Bissell v. New York Central Railroad Company*, *supra*), and cannot be considered good authority. It is therefore to be regretted that the court did not see fit to follow the opinion of the vigorously dissenting presiding justice.

WHAT IS A CORPORATION?—Formerly it may have been possible to give a satisfactory answer to this question, but not so to-day. At the time of Coke the division between a partnership and a corporation was marked. But with the growth of commerce a new sort of partnership has developed. In view of the benefits incidental to corporate action, the legislatures gradually provided that certain of the ordinary incidents of a corporation might be acquired by partnerships. Thus limited partnerships and partnerships not terminated by the death of a partner arose. So many indeed have become these legislative changes that what one may well call a new system of organizations has been created. At the same time the legislatures have more frequently limited the powers granted to companies organized for certain business purposes while continuing to employ the name "corporation" in their creation. Thus corporations almost shade into partnerships, while so-called partnerships on their part may possess the attributes of corporations; and this development has been so gradual that the new organizations retain both in popular usage and in statutes the name of the class from which they were evolved. Consequently it is apparent that a different result will be reached according as to whether the courts approach the matter with the hypothesis that an organization possessing certain attributes is a corporation or regard it, as the legislatures do, from the standpoint of the organization's origin. When it is remembered that the jurisdiction of a court over an action may depend on whether one of the parties is or is not a corporation, the importance of this question may be realized.

A recent decision of the Supreme Court of the United States turns upon this point. *Great Southern Hotel Co. v. Jones*, 177 U. S. 449. The plaintiff was a partnership association organized under a Pennsylvania statute which enacted that partnership associations might be formed by three or more persons, for a period of not more than twenty years, with limited liability, with power to sue and be sued and to acquire, hold, and convey real estate in the associate name, and governed by an elective board of managers; the shares to be personal property and transferable in such ways as the shareholders should provide, but in default of such provision a transferee was not to become a member of the corporation unless elected by the members. The association was held not to be a corporation. This decision follows several Pennsylvania and Massa-

chusetts cases. *Edwards v. Gasolene Works*, 168 Mass. 564; *Coal Co. v. Rogers*, 108 Pa. St. 147. On the other hand, it expressly overrules a well-considered decision of the Circuit Court of Appeals (6th Cir.), *Andrews Brothers Co. v. Youngstown Coke Co.*, 86 Fed. Rep. 585. Further, the leading case of *Liverpool Insurance Co. v. Massachusetts*, 10 Wall. 566, does not appear to have been called to the court's attention, and would seem to conflict with the principal case. Indeed, a Pennsylvania partnership association possesses more of the ordinary attributes of a corporation than the organization there held to be a corporation, as the latter could only sue and be sued in the name of an officer, and the liability of the stockholders was not limited. In one respect only is a Pennsylvania partnership association less like the normal corporation, — there is a provision for a *dilectus personarum* on the transfer of stock unless the members of the association, in their by-laws, otherwise provide. But that would seem to be really immaterial. It is often found in social clubs which are admittedly none the less corporations. It has even been said that no provision for succession is necessary. *Gifford v. Livingston*, 2 Denio, 395. The opinion of the court leaves to conjecture what attribute of a corporation was found lacking. But on the whole the test applied seems to be that an organization is or is not a corporation according as it is called by that or some other name in its charter, — certainly not a very scientific classification.

EFFECT OF NOLLE PROSEQUI IN MALICIOUS PROSECUTION. — A recent decision has reopened a controversy of long standing which had apparently been closed by a line of modern cases. The plaintiff was arrested on a warrant but the examining magistrate, without hearing any evidence, discharged the accused and dismissed the complaint. The court held this act equivalent to a *nolle prosequi* and therefore not a sufficient termination of the proceedings to maintain an action for malicious prosecution. *Ward v. Reasor*, 36 S. E. Rep. 470 (Va.). While this view has some backing, both reason and the trend of authority reject it. *Murphy v. Moore*, 11 Atl. Rep. 665 (Pa.).

In early times, the only remedy available for one who had been maliciously accused was conspiracy, and to maintain this, he must show a complete acquittal. But later, when an action for malicious prosecution was allowed, all that was necessary was a termination of the proceedings favorable to the accused. 2 Vin. Abr. 28. This distinction was not well understood by the courts and as, at that time, there was a mistrust of a *nolle prosequi* owing to its abuse by the public prosecutor, no little uncertainty as to its effect was caused. *Goddard v. Smith*, 6 Mod. 261.

The modern courts are misled both by these old English cases and by a misunderstanding of the allegations. It is not necessary that there should be an end to all prosecution upon that charge, but that the particular prosecution complained of shall have been finished. Unless this were so, no action could be founded upon an *ignoramus* by the grand jury, nor upon a discharge in a preliminary hearing, for, in both these cases, new proceedings may be begun. Thus there would be no remedy in those cases where the charge was least justified. A *nolle prosequi*, when put into force by a discharge, ends the particular prosecution, and in order to proceed against the accused again a new prosecution must

be instituted. *Woodworth v. Mills*, 61 Wis. 44. The courts have also failed to distinguish carefully the allegations of lack of probable cause and termination of the prosecution. The reason for this latter allegation is merely to obviate the possibility of two proceedings upon the same dispute pending at the same time. Bishop, Non-Contract Law, § 246. After termination of the proceedings has been shown, the task of proving a lack of probable cause still remains, and while this may be rendered more difficult by the manner of ending the prosecution, yet so long as there has not been a verdict of guilty, the fact that it has ended cannot be affected by the mode of closing it. When this distinction is kept in mind, there would seem to be no reason for insisting, as does the court in the principal case, that one cannot allege an end of the prosecution until some other court has passed on the question of probable cause. *Kennedy v. Holladay*, 25 Mo. App. 503.

CONFLICTING EQUITIES IN A PROMISSORY NOTE.—The decision of the English Court of Appeal in *Nash v. De Freville*, [1900] 2 Q. B. 72, reversing the judgment of the late Lord Russell of Killowen, is distinctly unfortunate. The defendant gave to one Peed three demand notes, under the express agreement that they should not be negotiated. Subsequently the defendant gave to Peed, under a similar agreement, two other demand notes in substitution for the first three, which, however, he neglected to take back. Peed, breaking faith with the defendant, negotiated all five notes to the plaintiff, a purchaser for value, without notice. Later the defendant paid Peed all he owed him on the notes, but again supposing them to be in Peed's possession, he failed to demand their return. Just before absconding Peed fraudulently induced the plaintiff to give up the notes, which he then mailed to the defendant. The latter, on receiving them, regarding the transactions with Peed as closed, destroyed the notes. On discovering Peed's fraud, the plaintiff brought his action against the defendant to recover the value of the notes, amounting to £5300. The court decided in the plaintiff's favor on the ground that the defendant was not a *bona fide* holder, since he gave no present value for the return of the notes, and since having been paid they were then overdue. The defendant was therefore said to have no better title than Peed, whose transaction with the plaintiff the latter was entitled to avoid.

The grounds for the decision cannot but strike one as surprising. It would seem that the court made a distinct blunder in treating the matter as if the notes had been going forward, instead of backward; that is, in regarding the taking up of the notes by the maker as a further negotiation. That a note should be due or overdue at the time the maker takes it up is perfectly natural, and surely cannot be a warning to him that there is something wrong with it. And as for value, if that need be discussed, the English Bills of Exchange Act (sect. 27, 1, b) expressly provides that an antecedent debt or liability shall be valuable consideration. But the true ground on which the case should have been decided lies within the broad doctrine enunciated in *Price v. Neal*, 3 Burrow, 1354. See 4 HARVARD LAW REVIEW, 297. While the notes were in Peed's possession, before negotiation by him, the defendant had an equity against them, but on the transfer to the plaintiff, a *bona fide* purchaser for value,

this equity was cut off. It would, however, attach whenever the bills should come again free and clear into Peed's hands. But when Peed, by fraudulent means, secured their return, the plaintiff had an equity which prevented the prior equity of the defendant from attaching. Had the transactions ended here, the plaintiff must have prevailed, on the theory of *Eyre v. Burmester*, 10 H. L. Cas. 90. The return of the notes to the defendant, however, vested the legal title in him, and cut off the plaintiff's equity. Both parties having been equally innocent throughout, their equities were equal, and in that case the holder of the legal title must prevail. *London Co. v. London Bank*, 21 Q. B. D. 535; *Colonial Bank v. Hopworth*, 36 Ch. D. 36. In deciding the case as it did, the court seems to have overlooked these fundamental principles.

LIABILITY FOR SLANDEROUS STATEMENTS INDUCED BY THE PLAINTIFF.—

The law regarding liability for slander when the publication is caused by the plaintiff, is somewhat confused, both because decisions are scant, and because facts differing very slightly call for the application of three different principles, two, at least, of which are not clearly defined. When at the request of the plaintiff, who wishes to discover the author of slanderous stories concerning himself, the defendant reports statements he has heard, since his doing so is clearly to the plaintiff's interest, the occasion is privileged. For a privileged occasion exists whenever there is a legal, moral, or social duty, or whenever it is to the interest of any party concerned that a statement be made. Again, when one induces another to publish a slander, solely that an action may be brought, there is no liability. This principle, although it has not often been clearly stated, rests on the plaintiff's consent — *volenti non fit injuria*. See 10 HARVARD LAW REVIEW, 181. Still a third principle ought to have been applied in a recent case, *Shinglemeyer v. Wright*, 82 N. W. Rep. 887 (Mich.). The case is poorly reported, but the facts seem to show that the plaintiff, while alone with the defendant, was accused by him of theft. Saying she would make him prove his statements before a policeman, the plaintiff procured one, and had the statement repeated in the presence of this third party. The court held that no liability existed, as the doctrine *volenti non fit injuria* applied. But the facts show no consent. The defendant, indignant at the accusation, and apparently wishing to prevent its future repetition, thought to end the matter by making the defendant either undertake to prove his statements at his peril, or desist from them altogether. She gave an opportunity for open accusation or retraction, but no consent. Moreover, since it was neither to her nor to the defendant's interests that the accusation be made, the occasion was not privileged. Clearly it seems that under these circumstances liability should attach.

In an English case, where the defendant repeated certain slanderous remarks at the plaintiff's request, they were held actionable. *Griffiths v. Lewis*, 7 Q. B. 361. That the previous statements in the principal case were unpublished would not differentiate the two cases, as in neither would the plaintiff, by asking the defendant if he was ready, at his peril, to repeat his statements to a third party, necessarily consent to their repetition. Nevertheless, the principal case is in accord with the few American decisions in point. *Heller v. Howard*, 11 Ill. App. 554.

AMELIORATING WASTE. — The law was formerly very stringent in repressing acts of waste. A tenant was not only liable for an act which injured the reversion, but it was even said, "if the tenant build a new house it is waste." Co. Litt. 53 a. But the law has developed with the changing conditions, and to apply the ancient doctrine of waste to modern tenancies would in some of our cities put an entire stop to improvement. Taylor, *Landlord & Ten.*, 8th ed., § 408. This adaptation of the law to modern exigencies is well seen in the American cases which hold it is not waste to clear a reasonable proportion of forest land. *Shine v. Wilcox*, 1 Dev. & B. Eq. 631. Two sets of rulings have contributed to this change. It has been long firmly established in the common law courts that when a plaintiff gets only nominal damages for an alleged waste judgment must be entered up for the defendant. *Governors of Harrow v. Alderton*, 2 B. & P. 86. Further, courts of equity have refused to enjoin technical waste when the damage was trivial. *Doherty v. Allman*, 3 App. Cas. 709.

A recent case seems to break in upon this latter rule. *West Ham Charity Board v. East London Water Works Co.*, [1900] 1 Ch. 624. The lessee of a term of ninety-nine years sublet the demised premises for a dumping ground. The evidence was in conflict as to whether or not the added material increased the value of the land. The court applied the test put forward in *Lord Darcy v. Askwith*, Hob. 234, and, finding that there had been an alteration of the demised premises, granted an injunction irrespective of the question whether the alleged waste increased or decreased the value of the premises. This case is in accord with an Ontario case, *Nottingham v. Osgood*, reported 3 Sedg. Damages, 8th ed., § 950, but as it would seem *contra* to *Meux v. Cobley*, [1892] 2 Ch. 213, and to *Doherty v. Allman*, *supra*, where the House of Lords refused to enjoin a tenant from converting a store into a dwelling-house, — certainly a much greater alteration of the premises than that in the principal case, — Lord Blackburn saying the later cases are all uniform that for an injunction real damage is required.

The opinion of the court in the principal case is not very helpful, and pays little attention to these recent cases, the rule followed, "that alteration of the thing demised is the test of waste," being that of a case decided in 1617. Undoubtedly, three or four hundred years ago it was very important for the security of title that the condition of land leased should not be altered, as a change say from the twenty acres of pasture stated in the deed to be demised to twenty acres of meadow might cause confusion. But with the present system of conveying by metes and bounds and the further aids of ordnance maps and registration of deeds this danger is very slight if not altogether chimerical. It is nowadays to the interest of the public that a tenant should be hampered as little as possible by restrictions which are vexatious to him without being of proportionate advantage to the reversioner. Consequently it would seem that for actionable waste substantial pecuniary damage to the reversion should be required and that a mere alteration of the demised premises which renders them unfit for their former use without decreasing their general value, is not enough. If the lessor considers their return in their former condition important, he can fully protect himself by covenants and conditions. Moreover, in spite of the principal case, it is submitted that there is no sufficient modern authority in conflict with this view.

RECENT CASES.

BANKRUPTCY — DISTRICT COURT — JURISDICTION. — A bill in equity was filed in the United States District Court by a trustee in bankruptcy to have a fraudulent conveyance by the bankrupt set aside. *Held*, that the court cannot entertain jurisdiction except by consent of the defendant. *Bardes v. First Nat. Bank*, 20 Sup. Ct. Rep. 1000.

This decision settles a point about which there has been much doubt. By the Bankrupt Act of 1867, trustees in bankruptcy were expressly authorized to sue in the United States courts. Such a provision was omitted in the present act, and, instead, the trustee was authorized to bring suits without the consent of the defendant only in courts where the bankrupt might have brought them had there been no bankruptcy proceedings instituted. Act of 1898, § 23, b. A majority of the lower courts have interpreted this as not applying to a case like the present. *In re Baudouine*, 96 Fed. Rep. 536; *In re Hammond*, 98 Fed. Rep. 845. This construction has also been taken by the recent text-writers. LOWELL, BANKR. § 486; LOVELAND, BANKR. § 20. A variety of reasons has been given for the position, but all appear very technical and unconvincing. See *Mitchell v. McClure*, 91 Fed. Rep. 621. The real reason seems to be that the act as passed is unquestionably made less effective by this limitation on the power of the national courts, and this has led to an effort to evade the clear intent of the legislature. Under the act as it stands, however, the principal case is clearly right, the difficulty being one for the legislature to correct. The explanation of the clause is apparently found in the somewhat widespread jealousy of national jurisdiction over bankruptcy proceedings.

BILLS AND NOTES — FRAUD — RIGHTS OF DEFRAUDED TRANSFEREE AGAINST INNOCENT MAKER. — The defendant gave to P several notes on the express agreement that he would not negotiate them. P wrongfully sold the notes to the plaintiff, a *bona fide* purchaser. The defendant, later, paid P the value of the notes to discharge them, but failed to demand their return. Subsequently P by fraud induced the plaintiff to give back the notes, and forwarded them to the defendant. *Held*, that the plaintiff can recover the value of the notes, the defendant not being a purchaser for value before maturity, and standing, therefore, in P's place. *Nash v. De Freuille*, [1900] 2 Q. B. D. 72. See NOTES.

CARRIERS — ADMIRALTY — LIMITATION OF LIABILITY ON GRATUITOUS PASS. — A common carrier by sea issued a gratuitous pass containing a condition that the company be absolved from liability for negligence. *Held*, that the limitation bars recovery for goods lost by the carrier's negligence. *The Stella*, [1900] P. D. 161. See NOTES, 14 HARV. LAW REV. 147.

CARRIERS — DISCRIMINATION — REASONABLE REGULATIONS. — The defendant refused to haul relator's special cars and to distribute its poles, etc., between stations as its construction work required, although like services had been performed for a rival telegraph line. *Held*, that a mandamus should be issued to compel such services. *State ex rel. Cumberland Tel., etc. Co. v. Texas & P. R. R. Co.*, 28 So. Rep. 284 (La.).

The principal case, although going a little further than cases hitherto have gone, is perfectly sound. If rested on the ground given by the court, that discrimination between different members of the public by a common carrier is illegal, it would probably be followed in many jurisdictions. *Messenger v. Pennsylvania R. R. Co.*, 37 N. J. L. 531. *Contra*, *Fitchburg R. R. Co. v. Gage*, 78 Mass. 393. But independent of the question of discrimination, the principal case may well be supported on another and more satisfactory ground. The right of a railroad to insist on stopping at stations only, instead of at any desired point along the road, depends on the reasonableness of the regulation establishing the stations. A regulation, for instance, which would result in carrying bulky articles such as coal, live stock, etc., to a general delivery depot, when the consignee has facilities for receiving them alongside the track, would, considering the way business is done, be regarded as unreasonable. *Coe v. Louisville, etc. R. R. Co.*, 3 Fed. Rep. 775. Similarly, in the principal case, considering the manner in which telegraph lines are usually constructed, it was unreasonable for defendant to refuse plaintiff's demand.

CONSTITUTIONAL LAW—DOUBLE JEOPARDY—DISCHARGE OF JURY ON FAILURE TO AGREE.—*Held*, that the discharge of a jury because of its inability to reach a verdict is not a bar to a second trial under a constitutional provision that no person shall be twice put in jeopardy for the same offense. *People ex rel. Dreyer v. Magerstadt*, 20 Nat. Corp. Rep. 266 (Cir. Ct., Cook Co., Ill.). See NOTES, 14 HARV. LAW REV. 151.

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—OFFICES.—*Held*, that the office of governor of a state is not property within the Fourteenth Amendment. *Taylor v. Beckham*, 20 Sup. Ct. Rep. 890. See NOTES.

CONSTITUTIONAL LAW—POLICE POWER—FOURTEENTH AMENDMENT.—A county ordinance prohibited the use of any repeating shotgun in hunting wild fowl. *Held*, that the ordinance is unconstitutional as interfering with the right of property in such a gun. *In re Marshall*, 102 Fed. Rep. 323 (Cir. Ct., Cal.).

The precise limits of the police power of the states are very uncertain, but it is well settled that game laws are properly within its scope. *Lawton v. Steele*, 152 U. S. 138; *People v. Bridges*, 142 Ill. 30. In the present case, however, the court grants that game laws in general are constitutional, but holds that this particular ordinance unreasonably discriminates against a particular class of guns, and is therefore bad. The better view clearly is that if the legislation in question in any way tends toward the desired end, the courts should not interfere. *State v. Mrozniński*, 59 Minn. 465. The legislature should be allowed to judge of the reasonableness of the particular means employed. *Phelps v. Racey*, 60 N. Y. 10. The court in the principal case seems not to have given due weight to this discretionary power.

CONSTITUTIONAL LAW—POLICE POWER—MILEAGE BOOK LAWS.—A New York statute enacted that all railroad companies within the state should sell one thousand mile tickets at a certain price. *Held*, that the statute is void, since it is not within the police power of the State. *Beardsley v. Erie R. R. Co.*, 56 N. E. Rep. 488 (N. Y.). See NOTES, 14 HARV. LAW REV. 143.

CONSTITUTIONAL LAW—VESTED RIGHTS—MECHANIC'S LIEN.—The plaintiff furnished materials to be used in the construction of the defendant's house. While suit was pending to enforce a mechanic's lien, the statute providing for such lien was repealed. *Held*, that the repealing law is valid and that the plaintiff's lien is destroyed. *Wilson v. Simon*, 45 Atl. Rep. 1022 (Md.).

That the constitutional provision against impairing the obligation of contracts does not interfere with legislation affecting remedies only is clear, since no one has a vested right to a particular remedy. *Commonwealth v. Hampden*, 23 Mass. 501; *The Collector v. Hubbard*, 12 Wall. 1, 14. The difficulty in cases like the present lies in determining whether the statute in question makes a legitimate alteration of a remedy, or whether it does not, in the form of changing a remedy, impair a vested right. On this question the courts have reached different conclusions. The principal case, in holding that a lien is merely an extraordinary form of remedy to which the plaintiff has no vested right and which the legislature may discontinue if it chooses, expresses what is probably the better opinion and is in accord with many of the authorities. *Bangor v. Goding*, 35 Me. 73; *Hanes v. Wade*, 73 Mich. 178. *Contra*, *Warren v. Woodard* 70 N. C. 382. Such statutes are very similar in general character to those abolishing imprisonment for debt, which are generally held to affect remedies only. *Penniman's Case*, 103 U. S. 714.

CONTRACTS—CONDITIONS—SATISFACTION OF PROMISOR.—In an action for breach of a contract reserving to the defendant the right to dismiss the plaintiff if his work was not satisfactory, there was evidence that the defendant was not, in fact, dissatisfied. *Held*, on motion by the defendant, that the case should not be left to the jury. *Crawford v. Mail, etc. Pub. Co.*, 57 N. E. Rep. 616 (N. Y.).

The court decide the case on the ground that in such contracts, where the subject-matter involves personal taste and judgment, the reasonableness of the satisfaction is immaterial. This is unquestionably good law. See 12 HARV. LAW REV. 496. But its application to these facts appears erroneous. While the defendant need not show that his dissatisfaction was reasonable, it is clearly within the terms of the contract that he be, in fact, dissatisfied. He should not be allowed to dismiss the plaintiff without cause, and then set up a fictitious plea of dissatisfaction. Since the plaintiff

offered evidence tending to show that this was the case, the lower court was clearly right in refusing to dismiss the suit, and leaving the question to the jury. *Daggett v. Johnson*, 49 Vt. 345.

CONTRACTS — STATUTE OF LIMITATIONS — NEW PROMISE. — *Held*, that a new promise, made after a cause of action is barred by the Statute of Limitations, does not revive the former obligation, but creates a new one on which the suit should be brought. *Ireland v. Mackintosh*, 61 Pac. Rep. 901 (Utah).

This decision holds that the statute destroys the legal obligation of the contract when it takes away the means of enforcing it, so that no subsequent action can revive the original right. The new promise is regarded as forming a new contract, on which action should be brought, the consideration being the moral duty to pay the outlawed debt. This doctrine of moral consideration has been almost universally discarded, although it was originally the ground of all the decisions on the point. *Ireing v. Veitch*, 3 M. & W. 90, 105. The better view is that the statute merely gives a defence, and that the action should be brought on the original debt, the new promise to be replied as a waiver to the statutory bar, if that is pleaded. *Alsley v. Jewett*, 44 Mass. 439; *Betton v. Cutts*, 11 N. H. 170. This rule is preferable in that it dispenses with an obsolete theory and is based on the real nature of the transaction. The anomalous rule that the action may be brought on either promise is entirely unsupportable. *Dusenbury v. Hoyt*, 53 N. Y. 521.

CORPORATIONS — ESSENTIAL ATTRIBUTES. — A Pennsylvania statute authorized the formation of partnership associations with limited liability, power to sue and be sued, and to acquire, hold, and convey real estate, in their associate names. It was provided also that the stock in these associations should be transferable, but only under such rules and limitations as their members should adopt. *Held*, that the plaintiff company, which was organized under this statute, is not a corporation. *Great Southern Fireproof Hotel Co. v. Jones*, 177 U. S. 449. See NOTES.

CORPORATIONS — PUBLIC HOSPITALS — LIABILITY TO PATIENTS. — The plaintiff, a patient in a public hospital chartered as a charitable corporation, was injured by the negligence of one of its nurses. *Held*, that he cannot recover from the hospital, even though he paid a pecuniary consideration for his treatment. *Powers v. Massachusetts Homoeopathic Hospital*, 101 Fed. Rep. 896 (Cir. Ct., Mass.).

In cases where no compensation has been paid by the plaintiff, this result has been reached on the ground that the funds of the hospital cannot be appropriated to pay for such damages. *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432. But here the court goes one step further, holding that the fact of payment of compensation to the hospital does not create a liability. They do not agree with the reasoning suggested above, but place their decision upon the ground that the plaintiff, having accepted the bounty of a charitable corporation, cannot complain of the way in which it is administered. Neither mode of reasoning seems adequate to support this rather anomalous doctrine, and several jurisdictions have rejected it altogether, and allow the patient an action. *Glavin v. Rhode Island Hospital*, 12 R. I. 411; 9 HARV. LAW REV. 541. This view seems preferable as tending to encourage strict care on the part of hospitals toward their patients, and as being in accord with the *respondent superior* doctrine of agency, to which there seems no reason for making an exception here.

CRIMINAL LAW — DOUBLE JEOPARDY — CONVICTION ON SELF-ACCUSATION. — *Held*, that a conviction for assault before a justice of the peace upon the convicted person's self-accusation is no bar to a subsequent prosecution by the assaulted party. *Jebord v. People*, 61 Pac. Rep. 599 (Colo.). See NOTES.

CRIMINAL LAW — GENERAL VERDICT — VALIDITY OF SENTENCE. — A general verdict was entered on an indictment containing several counts. After sentence some of the counts were found bad. *Held*, that since the sentence was no heavier than might properly have been imposed on the good counts, it must be sustained. *Haynes v. United States*, 101 Fed. Rep. 817 (C. C. A., Eighth Cir.).

This case is directly opposed to a decision of the House of Lords. *O'Connell v. The Queen*, 11 Cl. & Fin. 155, 294, 350. It is in accord, however, with the American cases generally. *Evans v. United States*, 153 U. S. 608. *Hazen v. Commonwealth*, 23 Pa. St. 355, 366. Under the American rule, when enough good counts are shown to sustain the sentence, the other counts need not even be examined, for the sentence

is proved legal. *State v. Davidson*, 12 Vt. 300, 303. Moreover, this rule is not unfair to the prisoner, for in fixing the sentence the judge may always consider facts outside the case. *Brightwell v. State*, 41 Ga. 482. Furthermore, if later the judge thinks the punishment too severe, the executive will invariably grant a pardon on his recommendation. Accordingly, since the result under the English rule is to let the prisoner off entirely, the American cases are clearly preferable.

EVIDENCE — HEARSAY — PROBABLE CAUSE. — *Held*, that on the question of probable cause in an action for malicious prosecution, the defendant should not be allowed to testify that, previous to making the charge, he had been told that plaintiff was a dishonest man and had been in trouble before. *Hart v. McLaughlin*, 64 N. Y. Supp. 827 (Sup. Ct., App. Div., First Dept.).

The decision in the present case can hardly be supported on principle. It is clear that the evidence is not objectionable as hearsay, since it is offered not as proof of the facts stated, but as proof of the knowledge with which the defendant acted in making the charge. *Bacon v. Towne*, 58 Mass. 217. Then, as the court admits, there is clear authority in favor of allowing evidence of the plaintiff's general reputation in the community on the question of probable cause. *Rodriguez v. Tadmire*, 2 Esp. 721; *Martin v. Hardesty*, 27 Ala. 458. But a reasonably prudent man would be no less justified in acting on information as to the plaintiff's character, communicated by one who knows the plaintiff, than on his general reputation. Accordingly, the rejection of the evidence offered here seems based on an unjustifiable distinction. The error probably arises from a misapplication of the established rule limiting character evidence in criminal cases to the defendant's general reputation. *Regina v. Rowton*, L. & C. 520.

EVIDENCE — PAROL EVIDENCE — LATENT AMBIGUITY. — *Held*, that a deed made to John Elliott and Amanda Elliott, his wife, as grantees, may be shown by parol evidence to have been made to a woman called by that name to whom John Elliott was unlawfully married, although he had a lawful wife living, also named Amanda Elliott. *Wolff v. Elliott*, 57 S. W. Rep. 1111 (Ark.).

There is a theory of construction that when the extrinsic facts have been looked into far enough to find a person who is accurately described, construction must stop, and no further evidence is admissible. *Stringer v. Gardiner*, 4 De G. & J. 468. The sounder view seems to be that in this class of cases, the court may look at all the facts in order to determine the grantor's meaning. *Grant v. Grant*, L. R. 5 C. P. 727; *Patch v. White*, 117 U. S. 210. This view is applied in the principal case. It is, however, an established exception, that a devise or bequest to *children*, or *issue*, imports only legitimate children, if there be such; and the words of the will being distinct, no extrinsic evidence can be received to show a different intention. *Cartwright v. Vawdry*, 5 Ves. 530; *Ellis v. Houstoun*, 10 Ch. D. 236. On principle, it would seem that the word *wife* should be given a similar technical construction, in which event the principal case is erroneous, the proper course being reformation of the deed.

EVIDENCE — PAROL EVIDENCE — VARYING CONTRACT. — The defendant made an oral contract with the plaintiff's agent. He also signed a different written agreement containing a stipulation that no oral conditions would be recognized. *Held*, that parol evidence is admissible to show that the defendant signed the contract with the understanding that it was not to be binding but was to be used for advertising purposes only. *Street Ry. Adv. Co. v. Shoe Mfg. Co.*, 46 Atl. Rep. 513 (Md.).

This decision is clearly correct. The so-called parol evidence rule as applied to this case simply means that, since by the law of contracts a written agreement, intended to be complete, must be enforced according to its terms, no evidence can be received to vary those terms, for it would be irrelevant. THAYER, PRELIM. TREAT. EV. 396, 397. But it is always permissible to attack the existence of a contract, and thus parol evidence should always be received to show that a given writing was never made or intended as a contract. *Raffles v. Wichelhaus*, 2 H. & C. 906; *Adams v. Morgan*, 150 Mass. 143. That was all which was attempted in the principal case. This distinction, however, has not always been recognized and consequently some unjustifiable decisions at variance with the principal case are to be found. *Beard v. Boylan*, 59 Conn. 181.

EVIDENCE — RES GESTA — PROXIMITY OF TIME. — A person since deceased met with an accident in a basement, and on coming upstairs ten or fifteen minutes later

made statements as to the fact, nature, and extent of the injury. *Held*, that such declarations are so nearly connected with the occurrence as to be admissible as a part of the *res gesta*, to prove the cause of his death. *Travelers' Protective Association v. West*, 102 Fed. Rep. 226 (C. C. A., Seventh Circ.).

The true conception of the *res gesta* rule is, that a statement, bad as hearsay, may yet come in when part of a transaction which is itself receivable. *Waldele v. New York, etc. R. R. Co.*, 95 N. Y. 274. Thus, strictly, the declaration, to be received in evidence, must be made contemporaneously with, that is, immediately after the principal fact and in explanation of it. *Thompson v. Trevanion*, Skin. 402; *Chicago, etc. Ry. Co. v. Bieker*, 128 Ill. 545. But it has been held that, although generally the declarations must be contemporaneous, yet where there are connecting circumstances, they may, even when made some time afterwards, form a part of the whole *res gesta*. *Travelers' Ins. Co. v. Mosley*, 8 Wall. 397. This assumes that the matter of time is not important, and would reduce the whole question to one of circumstantial evidence. But from this point of view all hearsay might be good and the whole nature of the hearsay rule would be changed. The decision in the principal case, being in accord with this looser rule, is thus very questionable.

EVIDENCE — WILLS — POST-TESTAMENTARY DECLARATIONS. — The due execution of a lost will having been proved, and its possession by the testatrix, *held*, that her subsequent declarations as to the will, although made shortly after its supposed destruction, are inadmissible to rebut the presumption of revocation. *In re Kennedy's Will*, 65 N. Y. Supp. 879 (Sup. Ct., App. Div., First Dept.).

This decision is opposed to the great weight of authority in England and America. *Sugden v. St. Leonards*, L. R. 1 P. D. 154; *Pickens v. Davis*, 134 Mass. 252. It is settled that in the absence of other evidence the loss of a will raises a presumption of revocation. *Behrens v. Behrens*, 47 Ohio St. 323. But this presumption may be rebutted by showing a lack of intent to revoke. *In re Steink's Will*, 95 Wis. 121. Moreover, the evidence here offered was competent to show such absence of intent, for the declarations of a person are admissible whenever it is relevant to show that person's state of mind at the time when the statements were made. *Mutual, etc. Ins. Co. v. Hillmon*, 145 U. S. 285. Furthermore, the state of mind of the testatrix in this case shortly after the supposed time of revocation is clearly probative of her intent at that time. On this ground the declarations should have been admitted, whatever weight they might subsequently have received.

PARTNERSHIP — NOTICE OF WITHDRAWAL — LIABILITY OF RETIRING PARTNER. — A, B, and C were in partnership under the name of A and B. The plaintiff made this firm an offer which resulted in a sale after C had withdrawn from the partnership. *Held*, that these facts do not constitute such dealing with the firm while C was a member as to entitle the plaintiff to special notice of his withdrawal. *Bowker Contracting Co. v. Scribner*, 65 N. Y. Supp. 444 (Sup. Ct., App. Div., First Dept.).

Whoever has dealt with a firm prior to its dissolution is entitled to special notice of the withdrawal of any partner, if that member is to be relieved from liability for subsequent transactions under the firm name. *Austin v. Holland*, 69 N. Y. 571; *Elkinton v. Booth*, 143 Mass. 479. The court in the principal case adopts the view that dealings mean such business relations as raise a credit upon the faith of the co-partnership. *Vernon v. Manhattan Co.*, 22 Wend. 190. Admitting the correctness of this definition, it is difficult to see why an offer to a firm before its dissolution which is accepted by the new firm using the old name is not such a dealing. The offer here was made to a firm of three members, and it does not alter the liability of the third member that the plaintiff was ignorant of his existence. *Elmira, etc. Mill Co. v. Harris*, 124 N. Y. 280. Thus a sale was made and credit given to the new firm upon the faith of the old and in consequence of the offer to the latter. This seems to fulfil the definition of dealings, and, if so, the decision here is wrong.

PERSONS — DIVORCE — JURISDICTION. — The plaintiff, who had been married in another state, later became domiciled in Louisiana, and sought a divorce there for causes antedating that domicile. *Held*, that the Louisiana courts have no jurisdiction. *Nicholas v. Maddox*, 27 So. Rep. 966 (La.).

It is held in the great majority of cases, that the place of domicile of the parties to divorce suits at the time when the offence was committed has no effect on the jurisdiction of the court. *Hubbell v. Hubbell*, 3 Wis. 662; *Tolen v. Tolen*, 2 Blackf. 407. The doctrine of the principal case is, however, not confined to Louisiana. *Norris v.*

Norris, 64 N. H. 523. There seems to be no reason on principle why the courts cannot take jurisdiction of such cases. Indeed, the question really before them is whether these parties are fit to live together in the state as married persons. The right of the court to determine such a question can in no way be affected by the facts shown, and the case is, therefore, unsound on principle.

PROPERTY — AMELIORATING WASTE. — Land demised by the plaintiff to the defendant for ninety-nine years was sublet by the defendant for a dump, and the height of the land was increased by the rubbish deposited. *Held*, that this alteration of the premises constitutes waste and that the defendant can be enjoined from continuing the user, even though the value of the premises would be increased thereby. *West Ham Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. D. 624. See NOTES.

PROPERTY — BOUNDARIES — LAND BOUNDED BY AN INTENDED STREET. — The City of New York granted a lot of land bounded by a street designated on a map but never opened. *Held*, that since by statute the city must own the fee in all streets, it cannot have intended to grant out what it would later have to buy back; and that, therefore, the deed carries the land only to the side of the intended street, not to the centre. *Graham v. Atern*, 64 N. Y. Supp. 728 (Sup. Ct., App. Div., First Dept.). See NOTES.

PROPERTY — IMPLIED GRANT — QUASI-EASEMENTS. — The owner of two adjacent lots sold one of them to the plaintiff and later the other to the defendant. At the time of both conveyances an alley on the defendant's lot gave access, and admitted light and air to the rear of the plaintiff's house, and its presence was reasonably necessary to the beneficial enjoyment of the plaintiff's property. *Held*, that the defendant had no right to extend her house over the alley. *Irvine v. McCreary*, 56 S. W. Rep. 966 (Ky.).

It seems settled in England and in many of our states that where the owner of two parcels of land has subjected one of them to quasi-easements for the benefit of the other, the easements will pass by implication to the grantee of the latter parcel, if they are apparent and continuous, and reasonably necessary to the beneficial enjoyment of the parcel conveyed. *Watts v. Kelson*, L. R. 6 Ch. D. 166; *Lampman v. Milks*, 21 N. Y. 505. Authority is divided as to the classification of ways, but the question of light and air clearly brings the principal case within this rule. In a few states, however, the courts limit the doctrine of implied grant to cases of strict necessity, refusing to read into a deed what is neither expressed nor necessarily implied. *Buss v. Dyer*, 125 Mass. 287. The broader rule is not easy to defend on technical grounds, and the cases which support it give no satisfactory reasons beyond the obvious desirability of the result. This, however, with the weight of authority amply justifies the decision in the principal case.

PROPERTY — NAVIGABLE RIVERS — TITLE TO ISLANDS. — An island formed in the Missouri River opposite plaintiff's land, separated from it by a narrow slough. *Held*, that the plaintiff has no title to the island, since the state, and not the riparian proprietor, owns the beds of rivers navigable in fact. *Moore v. Farmer*, 56 S. W. Rep. 493 (Mo.).

The common law rule is that river-beds belong to the state only where the tide ebbs and flows. *Pearce v. Scotcher*, 9 Q. B. D. 162. Most of the western states, however, are in accord with the present case in making public ownership of river-beds depend upon the fact of navigability. *McManus v. Carmichael*, 3 Iowa, 1. In England practically all navigable rivers are subject to tidal changes, and, moreover, the English courts appear to hold that river-beds do not belong to the crown, even though the tide ebbs and flows, if in fact the rivers are not navigable. *Mayor of Lynn v. Turner*, Cowp. 86 (*semble*). Hence, the application of the common law rule in England is practically identical with the result reached in the main case. Accordingly, just as the greater length and importance of our rivers has resulted in the extension of admiralty jurisdiction in this country to all navigable rivers, *Genesee Chief*, 12 How. 443, these same conditions equally justify the adoption by the western states of the spirit rather than the form of the common law on this point. *Packer v. Bird*, 137 U. S. 661. Thus the principal case is to be supported. The states where rivers are of little importance, however, generally adhere strictly to the common law rule. *Butler v. Grand Rapids, etc. R. R. Co.*, 85 Mich. 246.

PROPERTY — RIPARIAN RIGHTS — RESTORING STREAM TO ORIGINAL CHANNEL. — The plaintiff and defendant were riparian owners on opposite sides of a river which had been gradually encroaching on the latter's land. *Held*, that the defendant has a right to restore the stream to its original channel, although as a result the plaintiff suffers. *Gulf, etc. R. R. Co. v. Clark*, 101 Fed. Rep. 678 (C. C. A., Eighth Cir.).

It is admitted, in general, that a riparian owner may change the channel of a river to protect his land, only so far as he does not injure others. *King v. Trafford*, 1 B. & Ad. 874, 887; *Barnes v. Marshall*, 68 Cal. 569. The court attempts to distinguish the principal case, on the ground that restoring the water to its original bed was not changing its natural channel. But it seems that on principle this distinction is untenable. The wrong to the plaintiff remains the same in either case. He owned the land of which he was deprived by the defendant's act. The fact that the river had encroached on the defendant's land can have no effect on the plaintiff's right to his property. What little authority there is on the point takes this view. *Gerrish v. Clough*, 48 N. H. 9 (*semble*).

PROPERTY — WARRANTY DEED — AFTER-ACQUIRED TITLE. — A conveyed land to B with a covenant of warranty, and also with a covenant against all incumbrances except a certain mortgage, which A afterwards acquired and conveyed to C. *Held*, that this after-acquired title passed to B and not to C. *Rooney v. Koenig*, 83 N. W. Rep. 389 (Minn.).

This case is in accord with the doctrine generally followed in the United States, that an estoppel which affects an after-acquired title depends solely on the technical effect of the covenant of warranty. *Ayer v. Philadelphia, etc. Co.*, 159 Mass. 84; *Sandwich Mfg. Co. v. Zellmer*, 48 Minn. 408. On principle, however, the doctrine seems incorrect, for an estoppel is generally founded on a misrepresentation, and this cannot exist where the outstanding mortgage is mentioned in the deed, even though there be a covenant of warranty, for the truth appears on the face of the deed. *Temple v. Partridge*, 42 Me. 56. The most that can be found here is a promise to protect the grantee against the mortgage. Indeed, where the land is stated to be conveyed subject to a mortgage the doctrine of the principal case is not applied. *Merritt v. Rogers*, 46 Minn. 74. The main argument in favor of the decision is that it establishes a uniform rule that any superior outstanding title subsequently acquired by the grantor will inure to the benefit of the grantee, whenever land is conveyed with a covenant of warranty.

TORTS — ASSUMPTION OF DUTY — TERMINATION OF CUSTOM. — X contracted with a railroad company to load and move cars in an elevator. It had been the company's custom for years to set the brakes on certain cars when placed upon an incline. The plaintiff, who was employed by X, had relied upon such custom, and was injured because of its unexpected discontinuance. *Held*, that there is no liability, as the company was under no duty to set the brakes in question. *O'Leary v. Erie R. R. Co.*, 64 N. Y. Supp. 511 (Sup. Ct., App. Div., Fourth Dept.).

The court argued that since the defendant was under no contractual obligation to set the brakes, the practice could be discontinued at any time without notice. It has been held that a railway company, having stationed a watchman at a point where there was no duty to maintain one, did not incur an obligation to continue one there. *Cliff v. Midland Ry. Co.*, L. R. 5 Q. B. 258. It does not follow that the company may lure men into danger by ceasing the practice without notice. *Burns v. North Chicago Rolling Mill Co.*, 65 Wis. 312, 315. The relief sought here is not compulsory continuance of this practice. Admittedly it could have been discontinued after notice. The plaintiff merely asks damages for injuries resulting from defendant's failure to perform a duty which it had assumed. An earlier case held that, although signals at private crossings were optional, yet if the company is notoriously accustomed to give such signals, travellers have a right to rely upon the company's doing so. *Nash v. New York, etc. R. R. Co.*, 15 N. Y. St. Rep. 879. The principal case seems directly contrary and not to be supported.

TORTS — CONVERSION BY CARRIER — UNAUTHORIZED SHIPMENT. — A railroad company, employed to transport plaintiff's goods to Galveston as their destination, delivered them by mistake to defendant steamship company in Galveston for export to New York. *Held*, that in carrying the goods to New York the defendant company became liable for conversion, however innocently it acted. *Liefert v. Galveston, etc. Ry. Co.*, 57 S. W. Rep. 899 (Tex., Civ. App.).

No authority has been found for this decision, and, indeed, the contrary seems well established. *Greenway v. Fisher*, 1 C. & P. 190; *Gurley v. Armistead*, 148 Mass. 267. The carrier has been excused even when he continued the transportation after notice of the claim of the true owner. *Metcalf v. McLaughlin*, 122 Mass. 84. The court in the present case is perhaps misled by similar cases in which the carrier has been denied a lien for his charges, though it is clear that this question would not have been considered had the transportation itself been treated as a conversion. *Robinson v. Baker*, 59 Mass. 137. The general principle which should cover all these cases is that one who deals with possession only, without claiming any right or property in himself, or in any way dealing with title, is not liable to the true owner, provided he acts in good faith under the apparently rightful authority of one in possession of the goods. *Hollins v. Fowler*, L. R. 7 H. L. 757, 766. Thus the main case seems unsupportable.

TORTS—LOOK AND LISTEN RULE—STREET RAILWAY.—The plaintiff, while driving at night upon a road in the outskirts of a city, was struck by the car of an electric street railway company. *Held*, that his failure to look for an approaching car is contributory negligence, as a matter of law. *Wosika v. St. Paul City Ry. Co.*, 83 N. E. Rep. 836 (Minn.).

The fact that a failure to look and listen when crossing a steam railroad track is so uniformly held by juries to constitute contributory negligence, has led in many jurisdictions to its crystallization into a rule of law to be applied by the court without the aid of the jury. *Reading, etc. R. R. Co. v. Ritchie*, 102 Pa. St. 425. On principle, of course, this is indefensible, and the question of contributory negligence should always be left to the jury. *Terre Haute, etc. R. R. Co. v. Voulkes*, 129 Ill. 540, 551. But granting the arbitrary rule as regards steam railroads, its application to street railways even in suburban districts appears to be a dangerous precedent. The court limits the scope of its decision to such railways, and argues that the public convenience requires that in sparsely populated districts street cars should have a right of way approaching in its exclusiveness the right of steam roads. But the danger to the public from such a use of the highways is so great, that it seems the courts should be very cautious in making decisions which may lead to a lessening of care on the part of the railways.

TORTS—MALICIOUS INTERFERENCE WITH BUSINESS.—The defendants, members of a labor union, conspired to compel the members of a rival union to join their organization, by securing the discharge of the latter from employment through intimidations and threats of strikes. *Held*, that an injunction will lie to restrain them from so doing. *Plant v. Woods*, 57 N. E. Rep. 1011 (Mass.). See NOTES.

TORTS—MALICIOUS PROSECUTION—PROBABLE CAUSE.—*Held*, that the question of probable cause in malicious prosecution is for the jury. *Kehl v. Hope, etc. Co.*, 27 So. Rep. 641 (Miss.).

It has long been established in Mississippi as well as elsewhere, in cases of malicious prosecution and false imprisonment, that the jury must find the facts, if disputed, and the court must decide whether they show probable cause. *McNulty v. Walker*, 64 Miss. 198; *Panton v. Williams*, 2 Q. B. 169. But the House of Lords, while recognizing this rule as law, has expressed the opinion that it ought never to have become so. *Lister v. Perryman*, L. R. 4 H. L. 521. Since that opinion was announced several English judges have so framed the questions of fact for the jury as practically to leave the whole matter in their hands. *Abrath v. North Eastern Ry. Co.*, 11 App. Cas. 247. The same disposition has been apparent in this country. *Johnson v. Miller*, 69 Iowa, 562. On principle there is no sufficient reason why the question of probable cause should not be classed with those of reasonable care and fair comment, which are undoubtedly proper questions for the jury. Moreover, the law may ultimately adopt this position, but it hardly seems probable that the court in the principal case intended, without further consideration, to make so radical a departure.

TORTS—MALICIOUS PROSECUTION—TERMINATION OF SUIT.—The plaintiff was arrested on a warrant but was discharged by the preliminary magistrate before any evidence was introduced. *Held*, that this is not a sufficient termination of the prosecution in the plaintiff's favor to support an action for malicious prosecution. *Ward v. Reesor*, 36 S. E. Rep. 470 (Va.). See NOTES.

TORTS — SLANDER — PUBLICATION INDUCED BY THE PLAINTIFF. — The defendant privately charged the plaintiff with theft. The latter insisted that the defendant must prove his accusation and had him repeat it to a policeman. *Held*, that he thereby consented to the repetition, and that it is therefore not actionable. *Shinglemeyer v. Wright*, 82 N. W. Rep. 887 (Mich.). See NOTES.

TRUSTS — CONSTRUCTIVE TRUSTS — MINGLING MONEY. — The plaintiff deposited money in a bank which was, to the knowledge of its officers, hopelessly insolvent. The bank mixed the money with other funds, and went into the hands of a receiver the next day. *Held*, that the plaintiff can recover the whole deposit. *Richardson v. New Orleans, etc. Co.*, 102 Fed. Rep. 780 (C. C. A., Fifth Cir.).

In allowing recovery in this case, the court goes on the ground that a trust attached to the money, although it had been mingled with other funds. Clearly this would have been true if the money had been kept separate. *Saint Louis, etc. Ry. Co. v. Johnston*, 133 U. S. 566. But such reasoning will hardly apply to the present facts, for it is impossible to find a *res*. Since, however, the bank stopped business almost immediately after the deposit was made, the other creditors cannot claim that it has led to transactions which may have prejudiced their interests. Moreover, unless this claim is allowed, the fund to be divided among them will be gratuitously increased at the expense of the defrauded depositor. Therefore, on quasi-contractual grounds to prevent this manifestly inequitable result, the depositor should be given the position of a preferred creditor. *Central Nat. Bank v. Connecticut, etc. Co.*, 104 U. S. 54; *Harrierson v. Smith*, 83 Mo. 210. *Contra*, *Illinois, etc. Bank v. First Nat. Bank*, 15 Fed. Rep. 858.

TRUSTS — RESULTING TRUST — MISAPPROPRIATED FUNDS. — A guardian bought land, and paid part of the purchase price with her ward's funds. *Held*, that this creates no resulting trust in favor of the ward. *Myers v. Myers*, 35 S. E. Rep. 868 (W. Va.).

When a fiduciary buys land paying for it entirely with the funds of his beneficiary, it is universally held that there is a resulting trust in favor of the beneficiary. *Bancroft v. Cousen*, 95 Mass. 50. This is clearly correct, since the fund constitutes a *res* which can be followed into the land, and the fiduciary should not profit by his wrongful act, if the land increases in value. The same reasons require a trust to be imposed, as to a proportional share of the land, when the misappropriated funds form a part only of the purchase price. The principal case is, therefore, wrong on principle. It is moreover opposed to the weight of authority. *Bitzen v. Bobo*, 39 Minn. 18; *Watson v. Thompson*, 12 R. I. 466. *Contra*, *Bresinlian v. Sheehan*, 125 Mass. 11.

TRUSTS — RESULTING TRUST — UNEXPENDED BALANCE OF FUND RAISED BY SUBSCRIPTION. — Two ladies, beneficiaries of a fund raised by subscription, both died. *Held*, that there is a resulting trust of the unexpended balance of the fund to the subscribers in proportion to their several contributions. *In re the Trusts of the Abbot Fund*, [1900] 2 Ch. D. 326.

In an earlier case, the English courts held that where all the members of an association were dead, the unexpended balance of a fund raised by payments made by the several members went to the crown as *bona vacantia*. *Cunnack v. Edwards*, [1896] 2 Ch. D. 679. This decision, while the facts on which it is based are somewhat similar to those of the principal case, can be distinguished on the ground that by the rules of the association it was clear that each member parted finally with all his interest in the money subscribed. In the present case the fund was raised for a particular and temporary purpose only, and this purpose being completely performed, the manifestly equitable result is to divide the fund among the subscribers proportionately. *Easterbrooks v. Tillinghast*, 71 Mass. 17; *In re Printers', etc. Soc.*, [1899] 2 Ch. D. 184. The doctrine of *cy pres* is of course inapplicable, for the persons to be benefited by the gift were not indefinite. *Jackson v. Phillip*, 96 Mass. 539, 556.

REVIEWS.

A SELECTION OF CASES ON EVIDENCE AT THE COMMON LAW. With Notes. By James Bradley Thayer, LL. D., Weld Professor of Law at Harvard University. Second Edition. Cambridge: Charles W. Sever & Co. 1900. pp. xxi, 1263.

That such an excellent collection of cases as comprised the first edition of this work could well be bettered would not, before the appearance of this volume, have seemed probable. Yet by replacing some of the cases by more recent or clearer ones, by omitting or adding a few here and there, "so as to give the different parts of the book a better proportion" (as he tells us in an introductory note), — together with a few slight changes in arrangement, Professor Thayer has managed to improve materially upon the former edition of the "Cases on Evidence." Although the present volume contains only some twenty-five pages more than its predecessor, there is a notable gain in the amount of information contained. The ground covered is, of course, the same, but in the later edition a greater thoroughness, a greater breadth of information, seem to pervade the whole book.

Three topics have been especially benefited by this revision. Perhaps the only material criticism to the first edition of the "Cases" is that not enough space was given to the intricate topic of Witnesses, which formed the last chapter. In the present edition this matter has been remedied and the chapter materially enlarged. The subject of regular entries made in account books or in the course of duty or business is subdivided into account books of parties to the litigation, and entries and declarations of third parties made in the regular course of duty or business. This plan works for clearness in the grouping of the cases, while a note suggests the interdependencies of the two subjects, and the development of the one from the other. It is in regard to this very topic that the carefulness and depth of Professor Thayer's researches into the law of evidence come out strongly. And the extended quotations from the author's own "Preliminary Treatise" serve as an admirable commentary on the cases and their sequence. Another improvement, gained mainly by a few seemingly slight but all important changes in arrangement, is to be noted in the treatment of that part of the so-called "Parol Evidence Rule" which is devoted to principles and rules of construction. The present sequence of cases and explanatory notes seems better adapted to giving the student a broad view of the fundamental principles of this topic. Other changes, more or less slight, are to be noted all through the book. The subject of burden of proof has been expanded from six to fifteen cases. The cases on "Alterations" have been entirely omitted and a brief note substituted; a change for the better, as, by the general American doctrine, the matter is extremely simple. In short, all the changes seem to be for the better; and this second edition is an excellent improvement on what was already an excellent case book, as well as one of the most widely used of all the case books.

E. S. T.

THE ELEMENTS OF JURISPRUDENCE. By Thomas Erskine Holland, D. C. L. Ninth edition. New York: Oxford University Press, American Branch.—1900. pp. xvi, 430.

But little need be said in criticism of a scientific work that has gone through nine editions in twenty years. Its merits are too thoroughly recognized to require the aid of any words of commendation, and any hostile criticism would receive an abundant answer in the book's popularity. Certainly the lucidity of Mr. Holland's style, together with the perfection of his arrangement, and his comprehensive, yet at the same time concise, treatment of the subject show that the success is well deserved. In the new edition the general scheme of the work and the classification of rights have been left unchanged. The revision has been confined to minor alterations which, though considerable in number, are mainly unimportant. Reference is made to recent and important statutes, such as the Workmen's Compensation Act, 1897, and the continental tendency to substitute systems of state insurance for any direct liability of a master to his servants is noted. The statement in the former edition that a man has no right of immunity from needless mental suffering is qualified by the addition of "unless perhaps from a nervous shock causing bodily illness," and the case of *Wilkinson v. Downton*, [1897] 2 Q. B. 57, is cited as authority. This is still a moot point in the United States, and the decisions in the different jurisdictions are not at all uniform. The subject of marital rights is treated at much greater length than before, and the conflict between the American and English decisions as to the effect of mistake in avoiding the marriage is mentioned but not discussed. It is perhaps worth noting that Mr. Holland retains in the text the statement that "if a man contracts avowedly as the agent of another, though without authority, the pretended agent is liable for the deceit." On principle it can hardly be doubted that the remedy of the third party should be in an action of case for deceit instead of on an implied contract that the supposed agent has authority, as the courts now hold. Of course no such warranty of authority is contemplated by the parties, but it was created out of whole cloth by the court in *Collen v. Wright*, 13 Q. B. 784, possibly to obviate the injustice caused by the non-survival of tort actions. In another point of the law of Agency, however, it is not so easy to agree with Mr. Holland, namely, in his distinction between liability for the acts of a general and of a special agent. In reality there can be no such distinction. The principal in either case is bound by his agent's acts within the incidental as well as the express authority given to the agent, and in the absence of an estoppel, no further. Where an agent has to act for a principal in many ways his incidental authority is necessarily large. Where he has only one thing to do it may be very small, but it is none the less present; without some discretion being left to the agent the relation of agency cannot exist.

In a work on Jurisprudence the concrete law is only of secondary importance, and it is to this feature alone that the revision appears to extend; yet in the carefulness of this revision we see an instance of the thoroughness that has made all of Mr. Holland's work so valuable. For some comment on Mr. Holland's classification of rights, see 9 HARVARD LAW REVIEW, 163.

F. R. T.

TRIAL EVIDENCE. By Austin Abbott, LL. D. Second edition, revised and enlarged by John J. Crawford. New York: Baker, Voorhis & Co. 1900. pp. xxxvi, 1190.

Mr. Abbott published the first edition of his work about twenty years ago. It found immediate sale, since it satisfied a want long felt by the trial lawyer. It was not intended to be, nor is it, useful to the student of the theoretical law of evidence. But to the practitioner it became invaluable, offering as it did a ready reference to the rules of evidence applicable to every case. Its greatest merit perhaps lay in its arrangement. The learned author treated one after the other all the ordinary common law actions. These he classified not only according to the so-called forms of action, but also according to the character of the parties. He enumerated all the allegations and defences which the law required of the plaintiff or made possible to the defendant, as well as the methods of proof permissible in both. Each statement was fortified by copious authorities.

The present edition, so far as its text is concerned, amounts to little more than a reprint of the former one. Where the editor has condescended to amend or add, he has thought it superfluous to indicate the fact. The notes are open to the same criticism. In this portion of the book, however, the editor's work is seen to have been considerable, though the increase, when it is ascertained, after a laborious comparison of the two editions, appears to have been largely confined to the section dealing with actions based on negligence. The greatest fault of this volume lies in the paucity of late authorities. The cases are not brought down to date, and remain but a list of such decisions as were in existence before the issue of the original work. The most noticeable improvement over the earlier edition lies in the printing, type, and binding, which show that excellence and strength ever characteristic of the work of the publishers. In conclusion it may be said that the editor has rendered a service to the legal profession by placing in the market this admirable treatise which has for some time been out of print. To those, then, who have not the first edition, this volume will prove most valuable in the trial of cases; but those already in possession of the original will find it of little additional service.

H. F.

We have also received:—

THE LAW OF ELECTRIC WIRES IN STREETS AND HIGHWAYS. By Edwin Quinton Keasbey. Second edition, revised and enlarged. Chicago: Callaghan & Co. 1900. pp. xlv, 358. The first edition of this work appeared in 1892, when the law on this subject had hardly formed. Since then the employment of electricity has in all ways largely increased, and many new uses for it have arisen. It is but natural that the law should keep pace with this development. Accordingly, Mr. Keasbey has found it necessary to more than double the size of his book, and to add new chapters on questions that at the time of the first edition had not been distinctly presented as separate topics, namely, on condemnation of private rights, on the liability for injuries from the unauthorized obstruction of the highway, and from negligence in the construction or maintenance of the lines, and on the question whether

electric lines are real or personal property. But the most noticeable change is in the number of authorities referred to by the author. So great has been the litigation on this subject since 1892, that fully three times as many cases are cited as in the former edition. That in itself is a sufficient justification for a new edition. Moreover, as a consequence of the increased attention attracted to the subject, many problems which at the time of the first edition were unanswered have since been solved, and many new ones have arisen to take their place. As to these, Mr. Keasbey does not confine himself to a mere statement, but indicates the way in which they should be solved. His sound sense in the disposition of these complex questions should prove of the utmost value. Mr. Keasbey's style is clear, his arrangement excellent, and the book is one that is needed.

READINGS IN THE LAW OF REAL PROPERTY. An Elementary Collection of Authorities for Students, Selected and Edited by George W. Kirchwey. New York: Baker, Voorhis & Co. 1900. pp. xxix, 555. The aim of this book is to bring within the reach of students the necessary material, ancient and modern, for an understanding of the law of real property. This it successfully accomplishes by carefully arranged selections from works of authority: from Bracton, Littleton, and Coke, down to the present day, including numerous passages from leading cases. The student is thus given the fundamental principles of this branch of the law in the language of the early masters, coupled with a thoroughly modern treatment, both historical and expository. Especial attention is given to United States law. The meat of a whole library of property law is thus made easy of access. The book should prove of considerable assistance to students, especially in connection with the case system of study. A careful classification of the topics treated and an excellent index greatly add to the usefulness of the volume.

AMERICAN BANKRUPTCY REPORTS ANNOTATED. Reporting the Bankruptcy Decisions and Opinions in the United States of the Federal Courts, State Courts, and Referees in Bankruptcy. Edited by Wm. Miller Collier and James W. Eaton. Vol. III. Albany: Matthew Bender. 1900. pp. xlv, 896.

THE RIGHTS, DUTIES, REMEDIES, AND INCIDENTS BELONGING TO AND GROWING OUT OF THE RELATION OF LANDLORD AND TENANT. By David McAdam. In two volumes. Vol. II. Second edition. New York: Remick, Schilling & Co. 1900. pp. x, 857—1768. *Review will follow.*

THE POLICE POWER OF THE STATE, and decisions thereon as illustrating the development and value of case law. By Alfred Russell. Chicago: Callaghan & Co. 1900. pp. xvii, 204. *Review will follow.*

DER GESETZLICHE, SCHUTZ DER BAUGLÄUBIGER IN DEN VEREINIGTEN STAATEN VON NORD-AMERIKA. Von Dr. Georg Salomonsohn. Berlin: Carl Heymanns Verlag. 1900. pp. xv, 493. *Review will follow.*

CRIME AND CRIMINALS. Popular Edition, containing an analysis of the Luetgert and other noted cases. By J. Sanderson Christison. Chicago: The Meng Publishing Co. 1900. pp. 177.

PROBATE REPORTS ANNOTATED. With Notes and References. By George A. Clement. Vol. IV. New York: Baker, Voorhis & Co. 1900. pp. xxxiii, 767.

SOCIAL JUSTICE: A Critical Essay. By Westel Woodbury Willoughby. New York: The Macmillan Company. 1900. pp. xii, 385. *Review will follow.*

OUTLINE STUDY OF LAW. By Isaac Franklin Russell. Third edition. New York: Baker, Voorhis & Co. 1900. pp. xix, 344. *Review will follow.*

THE LAW IN ITS RELATION TO PHYSICIANS. By Arthur W. Taylor. New York: D. Appleton & Co. 1900. pp. iv, 550. *Review will follow.*

A STUDY OF THE COURT OF STAR CHAMBER. By Cora L. Scofield. Chicago: The University of Chicago Press. 1900. pp. xxx, 82.

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THE NEGOTIABLE INSTRUMENTS LAW.

HOWEVER much lawyers may differ as to the expediency of the attempt to secure by codification uniformity in American commercial law, all will agree that the commissioners for promoting uniformity of legislation in the United States could not have selected a better subject for the beginning of the experiment than that of negotiable paper. Even the opponents of codification must admit that the Negotiable Instruments Law, framed and recommended by the commissioners in 1896, and already enacted in fifteen states,¹ contains a number of desirable changes in the law of Bills and Notes, and will, when generally adopted, settle definitively several questions which have given rise to much litigation and conflict of decisions. On the other hand, the friends of codification who chance to read the following pages may become convinced that there are serious defects of commission and omission in the new code. Codification is with us a new art, and it is not surprising, although it is unfortunate, that the commissioners did not realize, as continental codifiers realize, the extreme importance of the widest possible publication of the proposed code, and the necessity of abundant criticism, especially of public criticism, from practising lawyers and judges, professors and writers,

¹ Colorado, Connecticut, Florida, Maryland, Massachusetts, New York, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Utah, Virginia, Washington, Wisconsin, and also the District of Columbia.

merchants and bankers. It is far from an agreeable task to offer criticisms at this late hour.¹ Nor would the following criticisms be offered now but for the writer's conviction that the Negotiable Instruments Law ought not to be enacted by any state which has not yet acted in the matter, unless changed in important respects, and that those states in which it has been adopted should remedy its defects by supplemental legislation.² The plan of making the law of Bills and Notes uniform throughout the United States has found favor in so many states that the enterprise ought to be carried through on the basis of the commissioners' proposed code. But in the interest of future codification, as well as for the sake of the law itself, this new legislation should be in such form as to stand the fire of adverse, if also fair-minded, critics.

Before considering the defects in the new code attention should be called to its merits. These are of two kinds: first, salutary changes in the law; and, secondly, the settlement of controverted questions.

Under the new law a negotiable instrument may be made payable to one or more of several payees,³ or to the holder of an office for the time being.⁴ These provisions give effect to the tenor of the instrument and nullify certain unfortunate decisions to the contrary in which the judges failed to grasp the mercantile conception of such instruments.⁵ Another judicial error is corrected by the provision that an instrument, though indorsed in blank, ceases to be negotiable by delivery whenever the last indorsement thereon is a special indorsement.⁶ Section 166 enacts that the maturity of an acceptance for honor of a bill payable after sight shall be calculated from the date of the noting for non-acceptance, and not, as was erroneously decided in *Williams v. Germaine*,⁷ from the date of the acceptance for honor. Since an

¹ The writer, although interested in the subject of Bills and Notes both as an author and a teacher, saw the Negotiable Instruments Law for the first time after its enactment by four state legislatures.

² For several of the criticisms here suggested the writer gratefully acknowledges his indebtedness to his colleagues, Professor Williston and Professor Brannan, who successively have had charge of the subject of Bills and Notes in the Harvard Law School during the last ten years, and he takes satisfaction in adding that these experts in the law of Negotiable Paper concur with the views expressed in this paper.

³ N. I. L. sect. 8-5. The references follow the numbering of the commissioners' draft.

⁴ N. I. L. sect. 8-6.

⁵ *Blanckenhagen v. Blundell*, 2 B. & Al. 417; *Cowie v. Stirling*, 6 E. & B. 333.

⁶ N. I. L. sect. 9-5, nullifying the doctrine first advanced by Lord Kenyon in *Smith v. Clarke, Peake*, 225; 1 Esp. 180, s. c. The language of sect. 9-5 is not happily chosen for the reasons pointed out, *infra*, p. 246.

⁷ 7 B. & C. 468.

acceptor, by section 62, engages to pay the bill "according to the tenor of his acceptance," he must pay to the innocent payee or subsequent holder the amount called for by the bill at the time he accepted, even though larger than the original amount ordered by the drawer. A bank certifying a raised check is in the same case, since section 187 assimilates a certification to an acceptance. If the acceptor or certifying bank must honor his acceptance or certification in such a case, *a fortiori* a drawee who pays a raised bill or check, without acceptance or certification, should not recover the money paid from an innocent holder. These results are at variance with numerous American decisions, but they are changes for the better, and, so far as adopted, bring the law of this country into harmony with the law of nearly, if not indeed all, of the European states.¹

Other judicious changes for the better, but not involving the correction of judicial mistakes, are the following: The abolition of days of grace;² the assimilation of sight and demand paper;³ the provisions that the negotiability of the instrument shall not be affected by its bearing a seal;⁴ that a payor may disregard a condition in an indorsement;⁵ and that the holder in due course may enforce payment of an altered instrument according to its original tenor.⁶

Especially to be commended are those sections of the new code which settle, and in the right way, certain questions which have been a prolific source of litigation and antagonistic decisions. Nothing but good can come from enacting that the negotiability of an instrument is not destroyed by a clause providing for the payment of exchange,⁷ or the costs of collection, or an attorney's fee in case of default,⁸ or by a clause giving a power to confess judgment.⁹ The same is true of the provisions that an antecedent debt constitutes value;¹⁰ that the holder in due course, although he paid less, may enforce payment of the face value from all parties to the instrument;¹¹ and that a check is not an assignment of the drawer's claim upon the bank.¹² The rules regulating the liability of the anomalous indorser¹³ are admirable, but for one slight omission which may be easily remedied, as will be shown on a subsequent page.¹⁴ The doctrine of SECTION 16, that one who has signed

¹ 4 HARVARD LAW REVIEW, 306, 307.

² N. I. L. sect. 7-1.

⁶ N. I. L. sect. 124.

⁹ N. I. L. sect. 5-2.

¹² N. I. L. sect. 189.

⁴ N. I. L. sect. 6-4.

⁷ N. I. L. sect. 2-4.

¹⁰ N. I. L. sect. 25.

¹³ N. I. L. sect. 64.

³ N. I. L. sect. 85.

⁵ N. I. L. sect. 39.

⁸ N. I. L. sect. 2-5.

¹¹ N. I. L. sect. 57.

¹⁴ *Infra*, p. 250.

a negotiable instrument complete on its face is liable thereon to a holder in due course, although it was never delivered by him, but lost by him, or stolen from him, or even from some one else after his death, is somewhat startling at first. But it should commend itself on reflection. It has been adopted, after much consideration, in Germany.

The new code, it is believed, would have gained greatly in simplicity, arrangement, and expression, if its framers had grasped firmly the principle that the formal right of a claimant upon a bill or note depends solely upon whether he is the holder by the tenor of the instrument, and had also given due emphasis to the distinction between real and personal or equitable defences. It is, however, too late to recast the code. The critic must content himself with pointing out formal or substantial defects in particular sections.

If it be said that it is not worth while to make merely formal changes in sections that have been already enacted in sixteen jurisdictions, it may be answered that clearness, conciseness, and the right way of putting things are intrinsically desirable, and that improvements of this kind do not involve any sacrifice, as to the substantive law, of the principle of uniformity.

It is from this point of view that the following suggestions are made as to matters of form.

SECTION 3-2 provides that an order or promise is not rendered conditional by the addition of "A statement of the transaction which gives rise to the instrument." What do these words mean? Do they cover the case of a note coupled with the words, "Given as collateral security for A's debt to the payee?" Such an interpretation, although a literal one, would be deplorable, and would nullify several decisions.¹ Mr. Crawford, the draftsman of the code, suggests that this sub-section applies to the case of notes containing a statement that it is given for a chattel which is to be the property of the owner of the note until the note is paid.² Such a note is deemed negotiable in several states,³ and justly, being in effect nothing more than a note secured by a chattel mortgage.

¹ *Robbins v. May*, 11 A. & E. 213; *Haskell v. Lambert*, 16 Gray, 592; *Costello v. Crowell*, 127 Mass. 293; 134 Mass. 280, 285; *American Bank v. Sprague*, 14 R. I. 410; *Hall v. Merrick*, 40 Up. Can. Q. B. 566.

² Crawford, An. N. I. L. 12.

³ *Chicago Co. v. Merch. Bank*, 136 U. S. 268; *Howard v. Simpkins*, 69 Ga. 773; *Choate v. Stevens*, 116 Mich. 28; *Heard v. Dubuque Bank*, 8 Neb. 10; *Mott v. Havana Bank*, 22 Hun, 354; *Kimball v. Mellon*, 80 Wis. 133.

But it is highly improbable that the courts of Massachusetts, Kansas, and Minnesota, which have taken the opposite view,¹ will treat this sub-section as changing the law of those states. One New York judge has already ruled that the Negotiable Instruments Law has no application to such a note.² Many cases have decided that the statement of a consideration in a note is not notice to a transferee of its failure.³ But the doctrine of these cases, which are doubtless the only ones which this sub-section can fairly be made to cover, is a rule as to *bona fides*, and has nothing to do with conditions. The sub-section in question should be stricken from the act. If interpreted literally, it is mischievous. If not taken literally, it is obscure, inartistic, and useless.

SECTION 36-2 and 3. An indorsement is restrictive which either (1) "constitutes the indorsee the agent of the indorser, or (2) vests the title in the indorsee in trust for or to the use of some other person." Since the so-called "agent of the indorser" has, under section 37, the right to sue in his own name on the instrument, but for the benefit of the indorser, he is in truth a trustee, and not a mere agent. The sub-sections 2 and 3 should therefore be consolidated as follows: "An indorsement is restrictive which vests the title in the indorsee in trust for the indorser or some third person."

SECTION 137 is to the effect that a drawee who destroys a bill delivered to him for acceptance, or refuses to return it within the usual time, shall be deemed to have accepted it. A refusal to accept is an acceptance! Such a perversion of language would be strange enough anywhere, but in a deliberately framed code is well-nigh inexplicable. As a consequence of this fantastic provision the holder may bring concurrent actions: against the drawee because of his fictitious acceptance, and against the drawer because of the drawee's non-acceptance. Nor is anything gained by this fiction, of which there is no trace in the English act. All the demands of justice are met by holding the misconducting drawee liable for a conversion of the bill.⁴ The section should be cancelled as worse than useless.

¹ Sloan v. McCarty, 134 Mass. 245; South Bend Co. v. Paddock, 37 Kan. 510; Deering v. Thorn, 29 Minn. 120.

² Third Bank v. Spring, 28 N. Y. Misc. Rep. 9.

³ 1 Ames, Cases on Bills and Notes, 775, n. 1.

⁴ Under the New York statute, 2 Rev. Stat. (6th ed.) 1161, from which section 137 is copied, the holder, to recover, must prove a conversion of the bill. Matteson v. Moulton, 79 N. Y. 627.

The following sections of the code seem to the writer to be defective, not merely in point of form, but in substance.

SECTION 9-3 declares an instrument to be payable to bearer, although it is "payable to the order of a fictitious or non-existing person." Such a rule ignores the tenor of the instrument; nor is there any judicial precedent or mercantile custom in support of the notion that a bill payable to a fictitious payee, but not indorsed in the name of such payee, is payable to bearer. In all the reported cases, instruments payable to a fictitious payee have been indorsed in the name of such payee before negotiation. By the combined effect of this section and section 16, if a note payable to a fictitious payee were stolen from the maker, and indorsed by the thief in the name of the payee, the maker would be liable upon the note to any holder in due course. For, the note being already payable to bearer, the forged indorsement in the payee's name would be of no legal significance. Such a result would be a cruel injustice to the maker. The section should be materially changed. The real and commendable object of the section would be attained, without resorting to a fiction, by a provision as follows: "If a bill be drawn, or a note made, payable to the order of a person known by the drawer or maker to be fictitious or non-existent, or of a living person not intended to have any interest in the instrument, and if such bill or note be indorsed by the drawer or maker in the name of the nominal payee, the instrument will have the same effect as a bill or note payable to the order of, and indorsed by, the drawer or maker respectively."

SECTION 9-(5) provides that an instrument is payable to bearer "(1) where it is expressed to be so payable" and "(5) where the only or last indorsement is an indorsement in blank." The language of this sub-section (5), which is borrowed from section 8-(3) of the English act, is not well chosen. If it is to be taken as it stands, a note payable by A to the order of B and bearing the anomalous blank indorsement of C would be payable to bearer. This, of course, would be an absurdity, but it is certainly true that the only indorsement is an indorsement in blank. This objection apart, the sub-section means that, if an instrument is expressly payable to bearer, it continues to be so payable, although it afterwards be indorsed specially; but that, if an instrument payable to the order of a particular person has become payable to bearer by being indorsed in blank, it ceases to be payable to bearer, if afterwards indorsed specially. This distinction between instruments originally payable to bearer and instruments made so pay-

able by indorsement in blank is illogical and undesirable, and probably was not contemplated by the framers of the English and American acts. There is still a third objection to this sub-section. If an instrument indorsed in blank and subsequently indorsed specially, so that it is no longer payable to bearer, is transferred by the special indorsee by delivery merely, the transferee cannot sue parties prior to the special indorser in his own name, but only in the name of his assignor. This puts the assignee to unnecessary inconvenience. As owner of the instrument, although not, according to this sub-section, holder, he ought to have the right to strike out the special indorsement, thus making the instrument once more payable to bearer, and as bearer to sue upon it in his own name. The following substitute is suggested for section 9-(1) and 9-(5): "The instrument is payable to bearer

"(1) when it is expressed to be so payable;

"(5) when, although originally payable to order, it is indorsed in blank by the payee or a subsequent indorsee.

"An instrument payable to bearer will, however, whenever it is indorsed specially, carry notice that the property in it was at one time vested in the special indorsee, so that, in the absence of an indorsement or assignment by him, all subsequent holders will hold for the benefit of such indorsee."

SECTION 20 provides that a person who purports to sign an instrument in behalf of a named principal is not liable on the instrument, if he was duly authorized by the principal. By necessary implication he is liable on the instrument, if not duly authorized.¹ This is a departure from the English act and from the almost uniform current of judicial decisions.² This new rule involves a flat contradiction of the instrument, and the fiction works not justice but injustice. For example: A, mistakenly believing that he is duly authorized, signs a note, "A, agent for B," and delivers it to C, the payee. At maturity B repudiates the note. He is, however, at that time a bankrupt. A is rightfully chargeable to C on his implied warranty of authority, but only to the amount that C might have recovered from B, if he had authorized the note. But, under section 20, A is liable to C for the face of the note.

By SECTION 22 the indorsement or assignment of the instrument by an infant "passes the property therein." Does this section,

¹ Mr. Crawford so interprets the section. Crawford, An. N. I. L. 26.

² Hall v. Crandall, 29 Cal. 567; Noyes v. Loring, 55 Me. 408; Bartlett v. Tucker, 104 Mass. 336; White v. Madison, 26 N. Y. 117; Miller v. Reynolds, 92 Hun, 400. The case of Byars v. Doores, 20 Mo. 284, is *contra*.

like the corresponding section of the English act, mean merely that the indorsee has the right to enforce payment from all parties prior to the infant, or does it mean that the indorsee becomes absolute owner of the instrument, so that he and his transferees, whether with or without notice of the infancy, may retain the instrument even against the infant? If it was intended to reproduce the effect of the English act on this point, it is unfortunate that the unambiguous language of that act was not retained. If, on the other hand, it was intended to make the infant's transfer of negotiable paper irrevocable, the section introduces a radical change in the law as to the rights of infants, and one that goes unnecessarily far in protecting an indorsee who knows that he is dealing with an infant.

SECTION 29 defines an accommodation party as one who has signed the instrument "without receiving value therefor and for the purpose of lending his name to some other person." By this definition one who has received a commission, which is certainly value, for lending the credit of his name would not be an accommodation party. But no business man or good lawyer would sanction such a distinction. The words, "without receiving value therefor and," should be cancelled as inaccurate and misleading.

SECTION 34 distinguishes between special and blank indorsements, but it is nowhere stated that an indorsement, like the drawing of a bill, is an order. If the payee writes, "I assign this note to B," or "I guarantee to B the payment of this note," is he liable as indorser on his assignment or guaranty? Is his transferee an indorsee, and therefore within the rule that gives a holder in due course the title free from equitable defenses? There are numerous but discordant decisions on these points, and it is unfortunate that the new code does not secure uniformity here, as it does in the matter of notes payable with exchange or attorneys' fees.

SECTION 37 confers upon the indorsee under a restrictive indorsement the right to bring any action that the indorser can bring. Inferentially such an indorsee cannot sue his indorser. This is just, if the instrument was transferred to the indorsee for the benefit of the indorser. But unjust, if the indorsement was for value to the indorsee in trust for a third person.

SECTION 40, which has no counterpart in the English act, provides that an instrument indorsed in blank, although subsequently indorsed specially, "may nevertheless be further negotiated by delivery," the special indorser being liable of course "to only such holders as make title through his indorsement." If, for example,

the special indorsee lost possession of the instrument by accident or theft, and the finder or thief transferred it by delivery to one who had no notice of the loss or theft, the latter is entitled to charge all parties antecedent to the special indorser. Lord Kenyon ruled to this effect in *Smith v. Clarke*,¹ and his view was followed by the courts,² and was repeated in the text-books, in a form much resembling the language of the section under discussion.³ But Lord Kenyon failed to see that the special indorsement was notice that the instrument had become the property of the special indorsee, and that the right of any subsequent taker must be derived through him. To correct Lord Kenyon's error, and, as Mr. Chalmers tells us,⁴ "to bring the law into accordance with mercantile understanding," section 8-3 was inserted in the English act, which defined an instrument payable to bearer as one "which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank." This section of the English act is reproduced in section 9-5 of the American act, so as to change the law in this country also. Then, in apparent forgetfulness of the effect of section 9-5, the framers of the American act insert section 40, which changes the law back to its former state. One of these repugnant sections, and preferably section 40, should be cancelled.⁵

SECTION 49 gives to the transferee of an instrument payable to the order of the transferer, but not indorsed by the latter, "such title as the transferer had therein," and also "the right to have the indorsement of the transferer." If an indorsement was intended, but omitted through inadvertence, it is obviously just that the transferer should be required to indorse subsequently. If, on the other hand, the omission is not due to inadvertence, it is as obviously unjust, as Mr. Bigelow has pointed out,⁶ to compel the transferer to assume the liability of an indorser. In section 44 it is provided that any person under obligation to indorse in a

¹ *Peake* 225; 1 *Esp.* 180, s. c.

² *Walker v. MacDonald*, 2 *Ex.* 527; *Savannah Bank v. Haskins*, 101 *Mass.* 370; *Houry v. Eppinger*, 34 *Mich.* 29; *Watervliet Bank v. White*, 1 *Den.* 608; *French v. Barney*, 1 *Ired.* 219; *Mitchell v. Fuller*, 15 *Pa.* 268.

³ *Bytes, Bills* (13th ed. 1879), 152; *Chitty, Bills* (11th ed. 1878), 173; *Chalmers, Dig. of Bills of Exch.* (1878) 96.

⁴ *Chalmers, Bills of Exch.* (5th ed.) 24. See also, *Bytes, Bills* (16th ed. 1899).

⁵ The neutralizing effect of section 40 upon section 9-5 is recognized by the learned writer in 17 *Banking Law Journal*, 775, who adds: "More wrong than right, it seems to us, will follow the operation of the law as it now stands."

⁶ *Bigelow, Bills and Notes* (2d ed.), 295, n. 1.

representative capacity may indorse in such terms as to negative personal liability. But there is no similar provision for a qualified indorsement in section 49. Such a provision should be added to this section.¹

There is a further objection to this section. If the transferee by delivery merely of an instrument payable to the order of the transferer always acquires only the rights of the latter, such a transferee of a note made for the accommodation of the payee could not enforce it against the maker, even though he might have given to the payee the money which it was the object of the maker to procure for the payee on the credit of his own name. Such a result would be a reproach to the law, even if due to the action of the courts. But this section, so far from codifying, actually nullifies the judicial precedents in this country.² This defect in this section would be cured by inserting after the word "addition" the words, "the right to enforce the instrument against one who signed for the accommodation of his transferer and."

SECTION 64, defining the liability of the anomalous indorser, is an excellent piece of codification but for one slip. One not otherwise a party to a bill payable to the order of the drawer may sign it for the accommodation of the acceptor, as in *Matthews v. Bloxsome*.³ He should clearly be liable to the drawer-payee. But by the subsection 2 he is liable only to parties subsequent to the drawer. This case may be provided for by making the first two sections read as follows:—

(1) "If the instrument is a note or bill payable to the order of a third person, or an accepted bill payable to the order of the drawer, he is liable to the payee and to all subsequent parties."

(2) "If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or payable to bearer, he is liable to all parties subsequent to the maker or drawer."

SECTION 65 introduces the distinction that the implied warranty of genuineness, title, and the like of the transferer by delivery inures to the benefit of his immediate transferee, whereas the sim-

¹ The Colorado legislature, to remedy this injustice, before enacting this section, added to the sentence requiring an indorsement the words, "if omitted by accident or mistake."

² *Hughes v. Nelson*, 29 N. J. Eq. 547; *Matthias v. Kirsch*, 87 Me. 523; *Meggett v. Baum*, 57 Miss. 22; *Freund v. Importers' Bank*, 76 N. Y. 352. See, further, the Scotch case of *Hood v. Stuart* (Court of Sess., March 20, 1870) and the analogous case of an accommodation bond, *Dickson v. Swansea*, L. R. 4 Q. B. 44, which greatly lessens the authority of *Edge v. Bumford*, 31 L. J. Ch. 805.

³ 33 L. J. Q. B. *Young v. Glover*, 3 Jur. N. S. 637, is a similar case.

ilar warranty of the indorser without recourse runs in favor of all subsequent holders. This idea that the indorser without recourse is liable to any one but his transferee is an original invention of the Negotiable Instruments Law. But this is its only merit. To say that such an indorser is liable in any manner on the bill is to contradict the plain language of his indorsement. His liability is extrinsic to the bill. As the vendor of the bill, he, like the vendor of other personal property, is liable to his vendee, but to no subsequent purchaser, for the genuineness and title of the thing sold. His liability is therefore identical with that of the transferer by delivery. This view is brought out in almost all of the sixteen reported cases seen by the writer, in which an indorser without recourse was made a defendant. There seems to be no trace of authority for an action against such an indorser by any one but his immediate transferee. In one case¹ a subsequent holder attempted to charge the indorser without recourse, but the court decided against him, Mr. Justice Dillon delivering a convincing opinion, in which the indorsement without recourse was treated as creating the same liability as a transfer by delivery. Section 65 should be amended by adding in the first sentence after "warrants" the words, "as a vendor, and, therefore, only to the vendee," and by cancelling the sentence beginning with the words, "But, when the negotiation."

SECTION 66 betrays the same misconception in regard to warranty as the preceding section. One who indorses without qualification is liable as indorser to all subsequent holders. If he transfers the bill for value, he incurs the additional but extrinsic liability of a vendor. But this liability runs only to his indorsee as a vendee. These liabilities are quite distinct. As indorser, he cannot be charged until the maturity of the bill and after due diligence exercised by the holder. As warrantor, since the warranty is broken at the moment of transfer, if at all, he may be sued at once, before maturity, and without regard to presentment or notice.² An accommodation indorser is obviously not a vendor. The party accommodated fills that position. The accommodation indorser is, therefore, not liable as a warrantor, but is chargeable only as

¹ *Watson v. Cheshire*, 18 Iowa, 202. In *Challis v. McCrum*, 22 Kan. 156, Mr. Justice Brewer said: "Of course no action will lie on the indorsement, for by his written contract Challis expressly declines to assume the liability of an indorser. If sustainable at all, it must be against him as a vendor, and not as an indorser, and upon the doctrine of implied warranty."

² *Turnbull v. Bowyer*, 40 N. Y. 456; *Warren-Scharf Co. v. Com. Bank*, 97 Fed. R. 181; *Copp v. McDougall*, 9 Mass. 1; *Flethen v. Lovering*, 58 Me. 437 (*semble*).

indorser upon the bill after maturity and due notice of dishonor.¹ Section 66, making an accommodation indorser liable as a warrantor, ignores an important distinction, nullifies sound decisions, and does injustice to the accommodation indorser by imposing upon him a liability which he never intended to assume, and which cannot be justified on any legal principle. Section 66 should be amended by omitting everything after "qualification" in the first line to the word "engages" in the first line of the last paragraph.

There is a further criticism to be made upon sections 65 and 66. The transferer by delivery or by a qualified indorsement not only warrants, in section 65-1, 2, and 3, the genuineness of the instrument, his title to it, and the capacity of prior parties, but also, by 65-4, 'that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.' Why should the knowledge of the transferer be irrelevant in the case of forgery, or capacity of prior parties, and yet be essential when the instrument is invalid because of usury or other statutory real defence, or, if the transfer is after maturity, by reason of payment, failure of consideration, or other personal defence? This sub-section codifies the New York case of *Littauer v. Goldman*,² which is at variance with general judicial opinion,³ and has been spoken of by the court of a sister state as "admittedly supported by no precedent."⁴ This sub-section would be consistent with the preceding sub-sections, if it read as follows: "That the instrument is subject to no real defence nor, if the transfer is after maturity, or after dishonor noted on the bill, to any personal defence." Furthermore, whatever be the final form of this sub-section, there seems to be no reason why it should not be incorporated, by reference, in section 66-1, if the latter sub-section is to be retained in any form.

SECTION 68 declares that "joint payees or joint indorsees who indorse are deemed to indorse jointly and severally." Joint makers, joint drawers, and joint acceptors are liable only jointly.

¹ *Central Bank v. Davis*, 19 Pick. 373; *Susquehanna Bank v. Loomis*, 85 N. Y. 207 (distinguishing *Turnbull v. Bowyer*, *supra*); *Case v. Bradburn*, 1 Daly, 256. The same distinction between an accommodation indorsement and an indorsement for value is illustrated by *Leach v. Hewitt*, 4 Taunt. 731, and *Cundy v. Marriott*, 1 B. & Ad. 196.

² 72 N. Y. 506.

³ *Giffert v. West*, 33 Wis. 617; *Daskam v. Ullman*, 74 Wis. 474; *Hannum v. Richardson*, 48 Vt. 508; *Knight v. Lanfear*, 7 Rob. (La.) 172.

⁴ *Wood v. Sheldon*, 42 N. J. 421, 424. See a similar criticism in *Meyer v. Richards*, 163 U. S. 385, 411, 412.

Why this arbitrary discrimination? It would seem to be a blunder, that should be corrected by cancelling the last sentence of this section.

SECTION 70. "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument." This changes or would change the law, and for the worse, as to certificates of deposit, in Georgia, Indiana, Massachusetts, New Jersey, New York, Pennsylvania, South Dakota, and Vermont.¹ Furthermore, presentment would not be necessary in the case of bank-notes circulating as money. The section should be amended by adding in the first line after "necessary" the words, "except in the case of bank-notes and certificates of deposit."

SECTION 119-4 "A negotiable instrument is discharged by any other act which will discharge a simple contract for the payment of money." If a creditor accepts a horse in satisfaction of his claim, not yet matured, the simple contract claim is discharged. But if a holder accepts a horse from the maker before maturity, in satisfaction of the note, the note is not discharged. The accord and satisfaction gives the maker merely a personal defence, which is cut off the moment the note is transferred to a holder in due course. This sub-section should be cancelled. It would be superfluous, even if it were accurate.

SECTION 120-3. "A person secondarily liable on the instrument is discharged by the discharge of a prior party." This sub-section is the most mischievously revolutionary provision in the new code. It means that if the maker is discharged by the statute of limitations, all the indorsers are *ipso facto* discharged. It means that, if a joint note is executed by "A, principal," and "B, surety," and B dies, whereby the whole burden survives to A, all the indorsers are discharged. It means that if by some inadvertence due notice should not be given to the first indorser so that he would be discharged, all subsequent indorsers, although duly notified, would also be discharged. It would mean, but for the saving grace of section 16 of the National Bankrupt Law, that an indorser would be discharged if any prior party received his discharge in bankruptcy. The bankrupt law was not in force when the new code was recommended by the commissioners, nor when it was adopted by some of the states, and it may be repealed at any time. It is almost needless to say that there is nothing corresponding to this provision in the English act. It was doubtless developed

¹ In California, Iowa, Michigan, Minnesota, and Wisconsin certificates of deposit need not be presented to charge the bank.

by the draftsman from the peculiar New York case of *Shutts v. Fingar*.¹ The New York court had introduced in *Merritt v. Todd*² the novel doctrine that, to charge the indorser of a demand note in that state, it was not necessary, as it is in other jurisdictions, to present the note for payment within a reasonable time. *Merritt v. Todd* was followed, with reluctance, in subsequent cases. In *Shutts v. Fingar* the holder failed to present a similar note to the maker until after the latter was discharged by the statute of limitations, but claimed the right, under the authority of *Merritt v. Todd*, to charge the indorser by a presentment at any time. The court, however, declined to follow that case to its logical conclusion. While adhering to the doctrine that a presentment of a demand note need not be made within a reasonable time, they decided that such a note must be presented before the maker was discharged by the statute of limitations. This, it will be seen, is a totally different proposition from that of sub-section 3. Since *Merritt v. Todd* has become obsolete through the adoption in New York of section 71 of the Negotiable Instruments Law, *Shutts v. Fingar* is now nothing more than a legal curiosity. This sub-section should be stricken from the new code.

SECTION 120-5 and 6 declare that a release of the principal debtor or a binding agreement to give him time will discharge a party secondarily liable, unless the holder expressly reserves his rights against such party. There seems to be no sufficient reason, on the one hand, for inserting these doctrines of suretyship in a negotiable instruments code, or, on the other hand, if they are to be inserted, for omitting other doctrines of suretyship of equal importance. But the question of superfluosity apart, these sub-sections are inaccurate in point of law. If the party primarily liable is an accommodation acceptor or maker, a release of him by the holder, or a binding agreement to give him time, does not discharge the accommodated drawer or indorser. The discharge of the drawer or indorser in such cases would be highly inequitable. The action of the holder cannot possibly prejudice them, for, under no circumstances, would they, on paying the holder, have any right either by subrogation or indemnity against the accommodation acceptor or maker. The authorities are unanimous against the discharge of the party accommodated, although he is only second-

¹ 100 N. Y. 539. A paragraph from the opinion of Ruger, C. J. (p. 545), forms the staple of Mr. Crawford's note to this section. *Crawf. An. N. I. L.* 84, n. (a). See, also, *Crawf. An. N. I. L.* 84, n. (c).

² 23 N. Y. 28.

darily liable on the instrument.¹ These sub-sections are not in the English act, and should either be eliminated from the American act or amended. Furthermore, if it is thought best to retain them in an amended form, another sub-section should be added, to the effect that an accommodation acceptor or maker, although the party primarily liable on the instrument, will be discharged, if the holder, with knowledge of the accommodation, releases, or by a valid agreement undertakes to give time to the accommodated drawer or indorser. The authorities are almost unanimous on this point also,² although in a few jurisdictions the accommodation party must resort to equity for his relief. In the judgment of the writer, the wise course is to drop sub-sections 5 and 6 from the act.

SECTION 175 subrogates the payor for honor "to the rights of the holder as regards the party for whose honor he pays and all persons liable to the latter." This section is identical with section 68-5 of the English act. Since an accommodation acceptor is not liable to the drawer, one who pays for the honor of the drawer cannot charge such an acceptor. Lord Erskine so ruled in *Ex parte Lambert*,³ disapproving of Lord Loughborough's decision to the contrary in *Ex parte Wackerbath*.⁴ But in *Ex parte Swan*,⁵ Malins, V. C., condemned with some emphasis the doctrine of Lord Erskine, and *Ex parte Lambert* has since been regarded as an overruled case.⁶ In the face of this the English Bills of Exchange Act and the American Negotiable Instruments Law have codified the overruled opinion of Lord Erskine. Mr. Chalmers in his excellent treatise is careful to indicate every instance

¹ Collott v. Haigh, 3 Camp. 281; Hill v. Read, 6 D. & Ry. N. P. 26; Sargent v. Appleton, 6 Mass. 85; Parks v. Ingram, 22 N. H. 283. The following cases turn on the same principle: Ludwig v. Iglehart, 43 Md. 39; Gloucester Bank v. Worcester, 10 Pick. 528; Bruen v. Marquand, 17 Johns. 58.

² Ewin v. Lancaster, 6 B. & S. 571; *In re Goodwin*, 5 Dill. 140; Hall v. Capital Bank, 71 Ga. 715; Lacy v. Lofton, 26 Ind. 324; Adle v. Metoyer, 1 La. An. 254; Guild v. Butler, 127 Mass. 386; Canadian Bank v. Coumbe, 47 Mich. 358; Meggatt v. Baum, 57 Miss. 22; Westervelt v. Frech, 33 N. J. Eq. 451; T. N. Bank v. Hastings, 134 N. Y. 501 (*semble*); State Bank v. Smith, 85 Hun. 200 (*semble*); Shelton v. Hurd, 7 R. I. 403. The opposite rule obtains in Pennsylvania and perhaps in Alabama. Stevens v. Monongahela Bank, 88 Pa. 157; Wilson v. Isbell, 45 Ala. 142. But even these states lend no support to the discharge of the accommodated drawer or indorser by a release or time given to the accommodation acceptor or maker.

³ 13 Ves. 179.

⁴ 5 Ves. 574.

⁵ L. R. 6 Eq. 344-365.

⁶ Byles, Bills (10th ed. 1874), 266, 277, and in later editions. Chitty, Bills (11th ed. 1878), 352. "The case of *Ex parte Lambert* is no longer law." 4 Am. and Eng. Ency. of Law (2d ed.), 499.

in which the English act modifies the previous law. But he gives no intimation that section 68-5 introduces any change. One must infer that he was unconscious of any change. This inference is confirmed by the first edition of his Digest,¹ published four years before the passage of the English act, in which he defines the right of the payor of honor in substantially the same language as that of the act. Mr. Chalmers's statement of the result of the decisions is in general so accurate that one wonders at this slip, which is all the more surprising, because in his Table of Cases Overruled he includes *Ex parte* Lambert as overruled by *Ex parte* Swan. Section 175 should be amended by substituting for "liable," the fourth word from the end, the word "prior." This amendment would make the section accord with the Continental Law,² with the California Code,³ and with mercantile understanding.

SECTION 186 provides that the failure to present a check for payment within a reasonable time will discharge the drawer "to the extent of loss caused by the delay," but makes no provision for the effect of not giving due notice of dishonor when the check has been presented but not paid. Such a case must therefore be governed by section 89, with the result that the drawer is absolutely discharged, although the laches in giving notice has not caused any loss to him. This is obviously an undesirable rule, and is an innovation of the English and American codification. The courts and the text-writers give the same effect to delay in presentment and delay in sending notice of dishonor.⁴

It remains to mention briefly the omissions in the Negotiable Instruments Law. The English act deals with the effect of the loss or destruction of a bill or note,⁵ defines the liability of the acceptor to the drawer,⁶ and the liability of parties in default for interest, damages, and reëxchange,⁷ and contains several provisions relating to the difficult subject of Conflict of Laws.⁸ There is

¹ Page 192.

² French Code de Commerce, Art. 159, translated in 3 Rand. Comm. Paper (2d ed.), 2836; German Wechselordnung, sect. 63, translated in 3 Rand. Comm. Paper (2d ed.), 2800.

³ Sect. 3205, 3 Rand. Comm. Paper (2d ed.), 2727.

⁴ Clark v. Nat. Bank, 2 MacArthur, 249; Griffin v. Kemp, 46 Ind. 172; Gregg v. George, 16 Kan. 546; Stewart v. Smith, 17 Ohio St. 82; Purcell v. Allemon, 22 Grat. 739; *In re* Brown, 2 Story, 502; Story, Prom. Notes, § 493; Dan. Neg. Inst. (4th ed.) § 1587; 2 Benj. Chal. (2d ed.) 270.

⁵ Sects. 69, 70.

⁶ Sects. 57 (1), 59 (2 a).

⁷ Sect. 57 (1), (2), and (3).

⁸ Sect. 72 (1), (2), and (3).

nothing in the American act on any of these topics. Neither act mentions the duty of the drawee of a check to honor it, if in funds, nor the effect of the failure of the last indorser to receive or to transmit notices of dishonor, duly mailed with the notice to himself, to be forwarded to prior indorsers.¹ These omissions, although marring the symmetry of the new code, cannot be urged as fatal objections to its general adoption.

But if the preceding criticisms are well founded, the errors and imperfections of the Negotiable Instruments Law are so numerous and so serious that, notwithstanding its many merits, its adoption by fifteen states must be regarded as a misfortune, and its enactment in additional states, without considerable amendment, should be an impossibility.

Uniformity of amendment would be secured, and the passage by all the states of a judicious code of Bills and Notes would be accelerated, if the commissioners would reconsider the present Negotiable Instruments Law and submit it, in a revised form, with their approval, and if also they would suggest the form of supplementary legislation requisite to secure the necessary amendments in the states which have already passed the Negotiable Instruments Law. If this action on the part of the commissioners is found to be impracticable, it is hoped that the amendments proposed in this paper may commend themselves to the state legislatures. Fortunately the correction of many of the errors requires only the use of scissors.

In pointing out the defects in the new code the writer must not be understood as criticising either the zeal or the skill of the commissioners. They made a mistake, it is believed, but not an unnatural one, in view of the novelty of the work, in not securing an abundance of competent criticism, both public and private, from widely different sources, before issuing with their sanction the final draft of the proposed law. To the lack of adequate criticism must be ascribed the shortcomings of the Negotiable Instruments Law.

James Barr Ames.

¹ Such failure discharges the prior indorsers according to *Aldine Co. v. Warner*, 96 Ga. 370; *Van Brunt v. Vaughan*, 47 Iowa, 145 (*semble*); *Stix v. Matthews*, 63 Mo. 371, 375. But *Wamesit Bank v. Buttrick*, 11 Gray, 387, is *contra*.

TEACHING LAW BY CASES.

NO American law school has ever existed in which the course of instruction, however narrow and poor it may have been, failed to include the study, in some sort, of reported cases. But how far should this study be carried?

Here the views of law teachers diverge.

A term has come into use, "case system," which is understood by many as denoting a scheme of legal education in which reported cases are the only sources of written information as to what the law is to which the attention of the student should be turned. I do not think that the term meant this to those who first used it. It does not mean it to them now. But it is received in that sense by many who would be their followers.

Any system of instruction from no other books than compilations of decided cases must necessarily be partial and imperfect unless supplemented by lectures. Nor are lectures of much substantial service to beginners in any branch of study unless they are given so slowly as to allow full notes to be taken, or refer to authorities which are to be, and by the ordinary man will be, afterwards consulted.

But dictation is a mediæval and, except for an occasional rule or maxim, may fairly be said to be an inadmissible mode of instruction; and, if reliance be had on reference to authorities, we come again to the question between case and text book.

Hence it is that the modern case-book is often partly a text-book also. Take the best of them, and how shall we describe it?

It is in substance a series of fragmentary discussions of particular topics, interspersed with fragmentary portions of opinions from reported cases.

The discussions are excellent so far as they go. The fragments of the opinions of the courts are well selected. The torso is there: if the arms and legs — the posture and *motif* — are not, it is only because there was not room for them in the collection.

A statue, to pursue the illustration, is a work of art. Every art has its rules and principles. These have been formulated by men of skill and experience. They are expressed in words. They are also expressed in marble. But the marble speaks all that is in it only to the initiated, the instructed. To gaze upon it brings to

all men pleasure, elevation of thought, perhaps a realization of history, an impulse towards the ideal in life. But that one may feel thus and think thus does not make him an artist. A study of a thousand statues could not make him even a good stone-cutter. He needs the direction of a master, the light of books, the dry mathematics of anatomy.

No science can be learned purely from particulars. The universals must be studied to discover what the particulars mean and whence they sprang.

Every reported law case is the story of a certain transaction between men and of its consequences. It is dramatic in its nature. One of Shakespeare's historic plays, well acted, makes past times and great men live again for us. But is the theatre a place to learn history in? It may be a place to stamp it in after it has been learned elsewhere, but is not even that to one whose studies have been careless or sporadic.

So, no important case, involving nice discussions, and striking out in new directions, can be of its best service to him who does not know what went before it and what has come after it. Law is a science of relations. The first thing for a law student to strive after is a sense of proportion. What is important and what unimportant? What is settled and what still in dispute? What was the starting-point from which the judge who delivered the opinion set out? What was the turning-point of the case? Is the logic sound, the conclusion certain, the result valuable?

What the ordinary law student desires is to be fitted for the bar. He does not expect to shine as a jurist at five-and-twenty. He does want to be ready to try a suit on a disputed account before a justice of the peace with a fair knowledge of the issues that may be involved. Whether Sir Edward Coke or Lord Mansfield was the first to lay down a certain rule recognized in modern law is of little moment to him. What that rule is he must know, and he must be able to state it in apt terms and on the occasion to which it applies.

Too much pains may be spent in tracing the slow evolution of legal principles through the mazes of the English reports. There is first a suggestion, perhaps, in a chance colloquy between court and counsel, which some barrister who happens to be present happens to jot down. A year or two later, some judge, half remembering what has passed and half forgetting it, adopts a similar line of thought in a charge to the jury, and on a motion for a new trial, it comes up at Westminster. This case goes off on another

point, but the same doctrine is assumed as sound without further inquiry in a subsequent decision, which Blackstone quotes and Kent repeats, and a hundred courts have since applied it.

To study out all this is not without its interest or profit; but there are other things more interesting and more profitable. For the average student, the true starting-point in learning this rule is the text-book which states it best.

What are text-books? They should be, and the few good text-books are, an orderly and succinct statement of the existing law on some particular topic, illustrated by apt examples, and fortified by references to reported cases. No general method of studying law is likely ever to be discovered which is better than that of requiring the scholar to read daily and read with care a chapter or two from such a book, and then to be ready to explain the principles of decision applicable to states of fact slightly variant from those given in the examples put by the author. As supplementary to this, the study of reported cases is of high value. Without it, I believe that it is worth far less.

A text-book on any subject once mastered, or the same ground covered by appropriate lectures, the way is open for advanced study on the same topic by the use of cases pure and simple. In a four years' law course for Americans, a natural and logical order of proceeding would seem to be to devote the first mainly to elementary instruction in the law as it exists, with but a rapid and general view of its historical antecedents; the second largely to text-book study of particular topics, supplemented by reference to cases of present value; the third to studies of more difficult topics, in great part from case-books; and the fourth to those branches that are hardest of all, such as the conflict of laws and comparative jurisprudence, and to special historical research among the older English judicial precedents. This final year would of course not be required as a condition of the bachelor's degree, but reserved for graduate work by earnest scholars.

It has sometimes been suggested that there is some analogy between what has been called the case method of legal education and the modern way in medical schools of relying more on clinical and laboratory work, and in theological schools of sending their men off to preach on Sundays in country parishes, and perhaps placing them during the week in a position to assist some city minister in the work of parochial visitation or recruiting for the Sunday-school.

On the contrary, the equivalent of all this to the law student is

the work in a lawyer's office, which was all that was open to him a hundred years ago. The study of a reported case is *toto calo* a different thing from the drafting of pleadings for a new suit or the preparation for its trial. For this there is a fourth and a fifth year of instruction awaiting almost every law student in his own office or that in which he may enter as a clerk. He will have, save in extremely exceptional cases, if he sets up for himself, not half enough business to do to occupy his time. Hence he can and should put twice the time he otherwise would upon whatever he has.

The law school may do much to make this introduction to the actual work of the profession easy, but it will not be by the use of case-books. It must come from a well-ordered system of moot courts, public or voluntary, and from suitable instruction in forms of conveyancing and rules and usages of local practice.

Books of cases are at once the glory and the reproach of Anglo-American law. They are its glory, because they have treasured up the best-considered thoughts of great judges, expressed on occasions which called out all their powers of reasoning and of statement. They are its reproach, because with one such opinion there are published a hundred which are simply of passing interest, and hardly of that except to the parties and the counsel in the cause.

Blackstone was a judge, a reporter of the decisions of other judges, and a writer of text-books. Which was his best work? The world could better afford to lose half the volumes of the English reports than two books of Blackstone's Commentaries.

In the United States, the rapid multiplication of reports is fast destroying their utility. The tendency of the bench, in all appellate courts, is more and more to recur to fundamental principles, without much reference to what other tribunals may have decided as to their application in particular causes.

It is these fundamental principles, with their more important exceptions and limitations, that the law student needs to apprehend, and so to apprehend as to have them at his service at the moment when he needs them. They must stand in order in the chambers of his mind, ready to come at call. He can never attain this from the study of cases alone.

Simeon E. Baldwin.

• THE CIVIL AND POLITICAL STATUS OF INHABITANTS OF CEDED TERRITORIES.

EVERY human being living in an organized political community who has rights and duties is citizen, subject or foreigner. These rights and duties are reciprocal, and are of necessity regulated and controlled by usage and in accordance with the law and constitutional principles of the state. The law of civilized countries ascribes to each individual at his birth two distinct legal states or conditions, — one by virtue of which he becomes the subject (citizen) of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another, by virtue of which he has ascribed to him the character of subject (citizen) of some particular country, and, as such, is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status. The political status may depend on different laws in different countries, whereas the civil status is governed universally by one simple principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil status; for it is on this basis that the personal rights of a party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend.¹ Under the American political system citizens (nationals) are naturally and usually divided into two general classes: (1) all the inhabitants (people) resident in the territories and owing allegiance to the state, who are secured by the public, natural, or fundamental law, the enjoyment of civil, personal, and property rights; (2) a limited and privileged number, who, for reasons or motives of state policy and expediency, are clothed with political power, and exercise the elective franchise. But so far as "protective rights" are concerned, the first class is as fully protected by law as the second class.

On the threshold, it is important to invite attention to the point, very material in any discussion of the subject-matter, namely,

¹ *Udny v. Udny*, 1 H. L. Sc. p. 441; *Moorhouse v. Lord*, 10 H. L. Cas. 272; *Shaw v. Gould*, L. R. 3 H. L. 55, App. 457; *Lawrence's Wheaton*, Int. Law, p. 631. Cf. *Lawrence's Wheaton*, Int. Law, pp. 630, 631.

that the status of inhabitants of acquired territory, while relatively within contemplation of the stipulations usually found in treaties of peace, is not only not determined conclusively therein, but is often postponed to await in this regard the future disposition of the new sovereign. This much appears from diplomatic history, from the texts of treaties, from legislative acts, and by decisions of the judicial department of the government of the United States. A moment's reflection must satisfy the careful reader that this must be so; any action upon a contrary principle would deprive the dominant government of an essential attribute of sovereignty and might lead to disastrous consequences.

It has been said that the acquisition of new territory by war or treaty is political; and its ascertainment as a fact is determined and concluded by the treaty power whenever it acts constitutionally, leaving nothing in this regard to the decision of the judicial department. Or, to employ customary language, the ascertainment of such a fact by the political department will be followed by the judicial department. As a necessary consequence of the transfer of territory without qualifying stipulations, dominion of territory and government of inhabitants is surrendered by the old to the new sovereign. The dominion over the territory — meaning public lands and state property — is absolute; dominion over the inhabitants, while transferred as a necessary consequence, is usually qualified by provisions for the exercise of the right of election in favor of the original sovereign by the inhabitants, provided it be exercised and publicly recorded within a period of time indicated. Whatever covenants the new sovereign enters into in this particular must be carried out in good faith, otherwise a violation of the treaty obligation is incurred. It is usually only as to these qualifying clauses in respect to the transfer or retention of allegiance of the inhabitants of acquired territory that a treaty of peace is conclusive. A treaty may of course contain specific guaranties for "the protection of life, liberty, property," and for "the enjoyment of the inhabitants of rights, privileges, and immunities," as have in fact many treaties for the acquisition of territory to which the United States has been a party. The inhabitants not comprehended by such qualifying stipulations come under the protection and allegiance of the new sovereign, whose obligations are regulated by public law, usage, and the laws of the dominant sovereign. Whether the exercise of a particular power in a particular way, under a given state of facts, is lawful and constitu-

tional and in accordance with the institutions of a free government may only be determined by the appropriate department of government charged with the decision of such questions. What is the appropriate department for the decision depends upon the constitution of the government and the character of the question. In the United States, if the question is essentially "political," the action of the political department is conclusive, and will be adhered to or followed by the judicial department. If, however, the question to be ascertained is "judicial" in the sense in which this term is used in American jurisprudence, the judicial department will take jurisdiction and decide it.

Between the ratification of a treaty of peace and the action of the legislative department in execution of the provisions of the treaty, territory and inhabitants are in a transition state. Until action is had by Congress, both are under the protection of the treaty and subject to the government of the Executive. And the extent of Executive power is different, according as the situation in such territory is war or peace. A former President of the United States once said in the House of Representatives :—

"There are, then, in the authority of Congress and of the Executive, two classes of powers, altogether different in their nature, and often incompatible with each other,—the war power and the peace power. The peace power is limited by regulations and restricted by provisions prescribed within the Constitution itself. The war power is limited only by the laws and usages of nations. This power is tremendous ; it is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, of property, and of life."¹

In the Senate, during the discussion of the Ten Regiment Bill, Mr. Webster, however, expressed his "repugnance to all this doctrine and all this practice." Events which have transpired in American history since an early period indicate that there has been an extension of the Executive power not perhaps originally contemplated, which is usually justified upon the ground that it is the necessary exercise by the Executive of the war power. The situation in the Philippines since the first hostile gun was fired in Luzon, though not war in the technical sense, presents a striking illustration of the exercise of the Executive power as commander-in-chief of the army and navy ; and recent hostilities in China are another instance of the exercise of the same power. The war

¹ Speech delivered by Mr. John Quincy Adams in the House of Representatives, 26th May, 1836.

power of the Executive, though from time to time assailed, criticised, and questioned, more usually in partisan or political discussions, has, for a long period of years, as occasion arose, been exercised to its full extent. Against the unwarranted exercise of this power the Constitution provides three checks: first, the authority of Congress to control supplies of men and money; second, the authority of Congress to impeach; third, the power of the Judiciary to refuse to give the sanction of law to whatever the Executive may do in excess of his power, and by holding the agents and instruments of his unlawful action to strict accountability. There exists a fourth check upon Executive aggression more potent and effective than constitutional restraints, and this is the power of public opinion when opportunely and unmistakably expressed. Whether or not the occasion justifies the use by the Executive of the war power must depend upon circumstances to be determined primarily by the Executive, who exercises a large measure of discretion in this regard.

The treaty of peace between the United States and Spain contained the following stipulations:—

"Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of the proceeds; and they shall also have the right to carry on their industry, commerce, and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the crown of Spain by making, before a court of record, within a year from the date of exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they reside.

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress. Article IX."

The first observation to be made in view of the first paragraph is, that it confines the privilege or right of election of original nationality to "Spanish subjects, natives of the Peninsula." Other "inhabitants of the territories" would therefore seem by omission to be excluded from exercising this privilege or right of election of original nationality when remaining within the territory ceded.

And this view is confirmed by the express language of the second clause, which relegates to the Congress the determination of the "civil rights" and "political status" of the "native inhabitants." And this brings us to the inquiry, What was intended and included in the terms "civil rights" and "political status;" and what, if any, effect do they have in respect to the actual nationality of the native inhabitants? It is contended on one side that as the native inhabitants have been, by the terms of the treaty, deprived of their original character, which was Spanish, and denied the privilege or right of election of original national character, their actual national character is that of Americans, entitled to all the rights, privileges, and immunities of citizens of the United States. On the other hand, it is contended that by the express terms of the treaty under which the territories were ceded their national character remains to be determined by the Congress, and until Congress acts in respect thereof they are inhabitants or citizens of the respective territories and *not* citizens of the United States. The competency of the treaty-making power of the United States to make a provision excluding the native inhabitants from the enjoyment of American national character until Congress acts has, it appears, been questioned in a civil suit which will be hereafter noticed. The collocation of the apt phrases "civil rights" and "political status" seems to have been inserted *ex abundanti cautela*, and to have been in the nature of a declaration of policy on the part of the treaty power of the United States. The clause in which they are used differs radically from corresponding clauses in other treaties to which the United States has been a party, and no precedent has been found for their use in this relation. This may, however, be readily accounted for, because the situation which confronted the peace commissioners was unique and novel, and they no doubt felt impelled to be as definite and explicit as the nature of things admitted. The phrase "civil rights" presumably includes or describes all those fundamental rights which a free people are understood to enjoy under all constitutional governments, the vindication of which has been consistently upheld by the courts of the United States. These fundamental rights of a free people must have been protected by the government of the United States, even though the treaty had been silent on the subject.¹ "Civil rights," however, is a broader phrase than "fundamental rights," and includes other rights which are in their nature political, and

¹ *Murphy v. Ramsey*, 114 U. S. 15-47, citing cases; *Church of Jesus Christ v. United States*, 136 U. S. 1, 44.

that are not usually comprehended in the description of "fundamental rights." In American law, "Civil Rights" is a term applied to certain rights secured to citizens of the United States by the Thirteenth and Fourteenth Amendments to the Constitution, and by various acts of Congress made in pursuance thereof. These amendments were designed to secure rights of a civil and political nature only, but not social or domestic rights. The determination of the "political status" is altogether a different matter. It means the legislative ascertainment of the future national character (citizenship) of these inhabitants. There are two kinds of citizenship under our political system of government, — federal and state; and suffrage is an attribute of the latter, exercisable in each state under the conditions and qualifications imposed by its constitution. It has been said that persons brought in by annexation of foreign territory are not regarded by the political or judicial department of the United States as aliens, but citizens; but this has been held to apply to persons resident in territory admitted as states of the Union, and in cases where there have been no qualifying clauses in the treaty.¹

National character (citizenship) implies a political tie or relationship existing between individuals and an independent state; it results ordinarily (a) from birth within the territory and jurisdiction of a particular state; or may be acquired as the result (b) of individual naturalization, or (c) of collective naturalization. In the first instance, the individual becomes a citizen, with or without the consent of the state; in the second instance, he may only become a citizen as the result of compliance with the laws or regulations of the state in respect thereto, clearly and definitely expressed. The individual cannot, in the second instance, ever become a citizen of a state against the will and protest of the state; and he may not enjoy the electoral franchise without express authority of the state.

It was pertinently said in an admirable and exhaustive address by Judge McAtee of the Supreme Court of Oklahoma, before the Bar Association of Oklahoma: —

"And while to us here residing in a territory belonging to the United States the blessings of liberty, including the constitutional, personal, and civil guaranties of liberty, have been so fully distributed that we have

¹ Story, *The Constitution*, ii. p. 654 (4th ed.), note by Cooley; Paschall, *Annotd. Constitution U. S.*, pp. 222-225; *Boyd v. Nebraska, ex rel. Thayer*, 143 U. S. pp. 135-186.

failed to observe the fact, while we claim citizenship in the United States, that we are not, in fact, citizens of that United States which is created by the Constitution; that we do not participate in the election of a President, of senators, or of representatives in Congress, and that since the Constitution itself provides only for the election of a President, of senators, and representatives, and for the creation of a 'judicial power of the United States,' that yet while the Congress has conceded to us as territory the privilege of electing a delegate who shall sit upon the floor of Congress and advise and serve concerning the interests of the territory from which he is sent, that yet, under the provisions of the Constitution, Congress itself has no power to give that delegate a seat."

Since the first part of this article was concluded, the attention of the writer has been invited to an interesting and exhaustive decision rendered some time in June of this year, in the United States Circuit Court for the Southern District of New York, in the case of *Goetze & Co. against the United States*. To the contention of counsel that it was not competent for the treaty-making power to insert provisions that may infringe rights protected by constitutional principles, the court (Townsend, J.) says: —

"The only remaining ground upon which it can be urged that Porto Rico status has been changed is that the treaty is unconstitutional. Thus far in the history of our country no treaty has ever been adjudged invalid on this ground. A treaty is not only the law of our land, but also a contract of the United States with another nation. A court would not be justified in overruling the act of the treaty-making power unless its reasons for so doing were strong and imperative."

The court concludes: "The treaty of Paris left the political status of the inhabitants of Porto Rico unchanged;" that is, in respect to the matter under consideration.

"Their status at the time of the cession was, as declared by the Supreme Court, that of inhabitants of a foreign country as regards the Constitution of the United States and within the meaning of the tariff acts. The treaty of cession did not change that status. And as Congress had not acted at the time of this importation, Porto Rico was still a foreign country in the sense of the tariff law, and duties were lawfully assessed on the articles imported therefrom."¹

The *Goetze* case is on appeal before the Supreme Court of the United States, and has been assigned for hearing on Monday, December 17.

In a proceeding on a writ of habeas corpus issued on petition

¹ *Goetze v. U. S.*, 103 Federal Reporter, 72 *et seq.*

of Rafael Ortiz, Judge Lockren (U. S. Dist. Court for Minnesota), on May 5, 1900, held that "upon the cession by Spain to the United States of the island of Porto Rico, that island became a part of the domain of the United States, and the Constitution, *ex proprio vigore*, at once extended over it, and became the supreme law of the land, including the provision giving the right of jury trial in criminal prosecutions."¹

Section VII. of the Act of Congress (April 12, 1900) entitled "An Act temporarily to provide revenues and a civil government for Porto Rico," etc., must be accepted as legislative recognition of the regularity and propriety of the qualifying clauses in Article IX. of the treaty of Paris in respect to the "political status" of the native inhabitants of the ceded territories. While it may be objected that the terms "citizens of Porto Rico" may not be, in a narrow technical sense, accurate, because there can be no such relation between individuals and a subject political community, yet they are purposely used in the act of Congress as *designatio personarum*, and as sufficient for the purposes of the legislation in hand.

These resident inhabitants of Porto Rico are citizens in relation to the local civil government, as the resident inhabitants of Oklahoma and the Indian Territory are citizens of Oklahoma and the Indian Territory.

In a case involving the construction of another branch of the concluding paragraph of Art. IX. of the treaty it was recently said:—

"The United States had the sovereign and undisputed right to provide in the treaty with Spain that all citizens of Porto Rico should at once become citizens of the United States, but it was not done. . . . The whole subject of collective naturalization was thus, by the express terms of the treaty relegated to the Congress of the United States. . . . The right claimed by the relator depends upon express proof that the rights of full citizenship were conferred; and it cannot be upheld solely upon the broad claim that the Constitution follows the flag, or the claim that in the United States there can be no subjects. If it were a case in which the relator was sought to be deprived of life, liberty, or property without due process of law, as required by the fundamental law of the United States, a different question would be presented."²

In the suit of Bigley and others against New York and Porto

¹ *Ex parte Ortiz*, 100 Federal Reporter, 955.

² Freedman, J., In matter of Frank Juarbe, Superior Court of New York.

Rico Steamship Co., Judge Brown of the United States District Court for the Southern District of New York is reported to have held "that Porto Rico, since the cession of the island by Spain to the United States, is not a foreign port, as it is subject solely to the sovereignty and dominion of this country."

"In the dependence of the territories upon the central government," says Cooley,¹ "there is some outward resemblance to the condition of the American colonies under the British Crown; but there are some differences which are important and indeed vital. The first of these is that the territorial condition is understood to be merely temporary and preparatory, and the people of the territories are assured of the right to create and establish state institutions for themselves so soon as the population shall be sufficient and the local conditions suitable; while the British colonial system contained no promise or assurance of any but a dependent government indefinitely. The second is that above given, that the people of the American territories are guaranteed all the benefits of the principles of constitutional right which protect life, liberty, and property, and may defend the same under the law, even as against the action of the government itself." Further discussing the relations of territories to the central government, the same author² says: "Rules and regulations for the territory of the United States may be of two kinds: First, those having regard to it as property merely, and intended to guard and improve it as such, and perhaps to prepare it for sale and sell it; and second, those which concern the government of the people who may reside within the territory before it is formed into states."³

From these necessarily brief considerations, the following conclusions seem to follow:—

First. That upon a change of sovereigns the ceded territory and its inhabitants remain under the municipal law, public and private, of the former sovereign, as the same subsisted at the time of the cession, until such time as the new sovereign, through the appropriate department of government, alters or modifies the same;

Second. The relations of the inhabitants of such territory, not excluded or excepted in treaty stipulations, are dissolved, and new

¹ Principles of Constitutional Law, p. 37.

² *Ib.* p. 182.

³ *U. S. v. Gratiot*, 14 Pet. 526.

relations are created between them and the government which has acquired their territory ; and that the law, which may be denominated *political*, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the new sovereign ;

Third. That the relation of the inhabitants to the new sovereign is that of subject or citizen, according to the stipulations of cession and the form of the incorporating state ;

Fourth. That under the American political system of government, the power of Congress over ceded territory and its inhabitants is discretionary and supreme ; and that legislation in respect to both is subject to no other control than the stipulations of the treaty and the Constitution ;

Fifth. That connected with these general rights and powers of Congress, there are obligations and duties which are to be ascertained from the law of nations, the stipulations of cession, and the principles of the Constitution of the United States, and the decisions of the courts ;

Sixth. That under the American political system of government the securities to life, liberty, and property which are incorporated in the Constitution were intended as limitations of its power over any and all persons who might be within its jurisdiction anywhere ; and that citizens of the territories, as well as citizens of the states, may claim the benefit of their protection.

Seventh. That as a result of the ratification of the treaty of Paris of December 10, 1898, the dominion of Spain over the territories ceded and their native inhabitants was transferred to the United States ; that the United States succeeded to the sovereignty of Spain, and that the allegiance of the unexcepted native inhabitants was transferred to the United States : in other words, the political tie which had formerly bound these inhabitants to Spain was transferred to the United States, and as a consequence, the obligation of the new sovereign to protect and the duty of the inhabitants to render allegiance became reciprocal.

Eighth. That according to the modern law of nations, the native inhabitants of the Philippine Archipelago, and of Porto Rico, must be deemed to be citizens or subjects of the United States.

Ninth. That under the national (municipal) law of the United States, the native inhabitants of the Philippine Archipelago and Porto Rico must be deemed to be citizens or subjects of the United States, until and as Congress shall determine their civil

and political status, or the Supreme Court in a proper case may decide.¹

Alexander Porter Morse.

WASHINGTON, November 15, 1900.

¹ The eighth and ninth conclusions were submitted to Mr. Crammond Kennedy, of Washington, D. C., who is well versed in international law, and is familiar with current history, and he made the following comment: "I agree with No. 8 with the following qualifications: (a.) Such rights of independence and self-government as the Sultan and people of Jolo had under the agreement with Spain when the treaty of Paris became effective. (See Mr. Schurman on this point.) (b.) The right of the native inhabitants, under the modern law of nations, to be consulted as to a change of their allegiance. (See Halleck, ch. vi. sec. 9.) Modern instances: San Domingo when annexation was proposed in Grant's administration; Saint Thomas when negotiations for selling the island to the United States were opened with the King of Denmark. (c.) The rights which the Filipinos had acquired by conquest. They had abjured their allegiance to Spain and had repossessed themselves of Luzon, outside of Manila, and established a government of their own before the treaty of Paris was concluded; and they might properly have been recognized as free and independent by the United States government. They had over 7000 forts on the coast as well as in the interior, including the city and port of Iloilo, which they took and governed in a civilized manner, almost heavenly compared with the conduct of the so-called Christian powers at Tientsin and elsewhere in China. From this point of view our government is waging a war of subjugation in Luzon, and the inhabitants of the districts they control are neither citizens nor subjects of the United States.

"I agree with No. 9 with the qualification that Congress in legislating for the inhabitants of any part of the territory or domain of the United States is bound by the Constitution, anything in the treaty of Paris, expressed or implied, to the contrary, notwithstanding."

THE ELASTICITY OF THE CONSTITUTION.

II.

FROM the facts and argument contained in the former part of this article it appears that the object of all interpretation is the discovery of the original intent ; and that, this being a constant, the construction of the Constitution should never vary.¹ If a given construction was correct in the year 1800, it is correct to-day. If wrong then, it is wrong now, no matter how expedient a change may be. The construction of the Constitution is as much a part of the instrument as the words themselves, and can no more change by lapse of time and altered circumstances than the text itself. Neither the one nor the other can be altered except by a constitutional amendment duly passed.

It does not follow that an act which was unconstitutional one hundred years ago must necessarily be so held to-day. For while the Constitution and its construction must remain unchanged, yet the validity *vel non* of a legislative act often depends partly upon questions of fact, and the facts upon which the decision hangs may have completely changed within a century. The separation of the law from the facts is a difficult but transcendently important task. For while denying in the most unqualified terms the notion that the Constitution is capable of a varying construction, we may often be swayed by the same arguments advanced in favor of that heresy, and even reach the same results, but in a perfectly legitimate way, simply by a careful discrimination between matters of law and fact. The law of the Constitution remains forever unchanging: the facts to which it must be applied are infinitely various.

The distinction between law and fact is, however, often so difficult and illusory that constitutional cases which really turn on matters of fact sometimes seem to establish some novel proposition of law. Hasty inferences, therefore, in regard to such matters should be avoided. For such decisions are often thought to prove that the interpretation of the Constitution may vary — a position which has already been proved untenable. For example, the Con-

¹ "An act of Parliament cannot alter by reason of time." Dwarries on Statutes, Maxim IV. (Potter's ed.) p. 122.

stitution provides that amendments shall be adopted only with the consent of three fourths of the states. When the number of states was thirteen, the consent of ten was sufficient. Now that the Union is composed of forty-five, the same number—ten—is, of course, wholly inadequate. Because, in 1790, the best authorities would have held the consent of ten states enough to ratify an amendment, while at the present day the decision would be different, it would be idle to argue that the construction of the Constitution has changed. Every one would at once perceive the fallacy. The interpretation of the Constitution is unaltered. Now, as formerly, three fourths of the states, and three fourths only, are requisite. But the number of states in fact has multiplied nearly fourfold. Therefore, while the same meaning is given to the words, "three fourths of the several states," the facts to which the law must be applied have changed, so that the same interpretation of the instrument reaches a different result as to the power of ten states. In this particular case the matter is so transparent as to render analysis almost superfluous; but, in more complicated cases, the detection of error is no such child's play.

For example, the Fifth and Fourteenth Amendments forbid arbitrary legislation. It is obvious that a law might, under one state of facts, be most unjust and oppressive, while an act couched in precisely the same terms might, under other circumstances, prove highly beneficial. Thus, an act passed at the present time in the interest of manufacturers of oleomargarine forbidding absolutely the sale of butter would undoubtedly be arbitrary legislation. But suppose the facts should change. Suppose oleomargarine should come to be by all classes of people greatly preferred to butter as an article of diet. In other words, suppose present conditions to be exactly reversed, so that butter should be deemed, as oleomargarine is now, an undesirable product which unscrupulous dealers are likely to substitute for a similar and more popular article. On those facts, it seems, the legislature might constitutionally prohibit the manufacture and sale of butter; and for the prevention of fraud, a law to that effect would be sustained, just as acts absolutely forbidding the sale or manufacture of oleomargarine are now, for that purpose, upheld.¹ Therefore, circumstances might arise in which the sale of butter might constitutionally be forbidden. Yet the construction of the Constitution would not have varied. The same rule of constitutional law

¹ *Powell v. Pennsylvania*, 127 U. S. 678.

would be applied, the same definition of "due process" would be given. It is the facts which would have changed; the law — the interpretation of the Constitution — would be still unaltered.

In such instances the distinction between the facts, which may vary, and the law, which must remain constant, while reasonably clear, is nevertheless to some people somewhat obscured, because the facts upon which the constitutionality of an act of the legislature depends are never determined by a jury, but always by the court. Of course, the judges in actions at law are often called upon to decide questions of fact; and it is an obvious, though common error to suppose that all matters of fact are submitted to the jury.¹ Moreover, even in a jurisdiction where by constitutional provision the jury in criminal cases are judges of law as well as of fact, they are not permitted to question the constitutionality of an act of assembly.² So high a function is reserved exclusively for the judiciary; and the courts are of course entitled to decide any incidental questions of fact by which their decision might be influenced. If a judge ever chooses to take the opinion of a jury upon these matters, it should be clearly recognized that in so doing he is acting merely for his own convenience and better information. The decision of the jury is in no sense binding on him.

One result of confusion of law and fact in constitutional cases is that decisions rendered upon one state of facts are cited for authority under totally different circumstances. Moreover, the courts seem to feel that unless they reach the same ultimate result, they are being swayed by "purely legislative" considerations. Indeed, one unfortunate consequence of the reverence of the common law for judicial precedent is the likelihood that decisions on matters of mere fact will be treated as establishing a rule of law. This is exemplified wherever a court is called upon to decide questions of fact. Thus, in the construction of wills and other written documents, a mere inference of fact is sometimes called and often treated as a proposition of law. So the exercise by the court of its supervisory power to prevent or set aside unreasonable verdicts is often, though erroneously, thought to be the annunciation of a point of law. It is through this error that the "stop, look, and listen" rule has crept into the negligence law of some states. In the same way, this tendency to adhere to what

¹ Thayer, *Prelim. Treatise on Ev.*, pp. 183-189.

² *Franklin v. State*, 12 Md. 236.

appears to be the letter of prior decisions is a force which must be reckoned with in constitutional cases, even when the facts which justified the earlier judgment no longer exist. Thus, in *Budd v. New York*,¹ the Supreme Court of the United States held that the prices charged by certain grain elevators at Buffalo and New York city were subject to reasonable legislative control; and they assigned as their *ratio decidendi* that such elevators, lying at the two extremities of the river and canal route from the Great Lakes to the Atlantic, formed part of that system of transportation and enjoyed a "practical monopoly." In a subsequent case,² the question related to an elevator in a small village in Dakota. It was urged upon the court that all the former reasoning was inapplicable, that the question arose upon widely different facts. There was no "practical monopoly;" the elevator formed no link in any system of transportation; and yet the court brushed aside all this argument with the reply that these were "purely legislative" considerations, and *Budd v. New York* was treated as controlling authority. Without questioning the soundness of either decision, it may be permitted to doubt whether the second was a *necessary* consequence of the former. That is to say, it must be conceded that some laws may be contrary to the federal Constitution in Dakota which would be unexceptionable in New York, and *vice versa*. The habits, manners, opinions, and needs of the people of the several states are so widely divergent that what would be arbitrary in one state at one time may, at the same time in another state,³ or at another time in the same state,⁴ be harmless and even beneficent.

¹ 143 U. S. 517.

² *Brass v. Stoesser*, 153 U. S. 391.

³ "What would be a fair and just provision in one state might be oppressive and grossly arbitrary elsewhere. Each state has its peculiar interests and traditions that may call for distinct legislative policies. The federal courts must recognize that doctrines (*e. g.* relating to mining, irrigation, levees, etc.), obtaining justly and of necessity in the West and Southwest, might be entirely inapplicable and unreasonable if enforced in the states of the East, and laws enacting them might be held arbitrary and void as entirely unsuited to conditions in the Eastern states. But the question is more legislative than judicial." Guthrie, Fourteenth Amendment, p. 72. Cf. *King v. Mullins*, 171 U. S. 404, 422; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 160.

⁴ This is strikingly illustrated by the form of the decree in *Smyth v. Ames*, 169 U. S. 466. In that case certain railroad companies sought to enjoin the enforcement of a statute of Nebraska which was alleged to deprive them of property without due process of law by prescribing unreasonably low freight charges. The court, after stating the various circumstances on which the reasonableness of rates depends, and after holding the statutes unconstitutional as applied to the facts in existence when the decree of the court below was passed, used the following language: "It may be added that

Of course, it is true that such distinctions are "more legislative than judicial,"¹ and that this doctrine in regard to the Fourteenth Amendment opens up to the courts many matters unsuited for judicial discussion. But our judges must recognize that under the American system of constitutional government many problems must be submitted to the judiciary which in other countries would be referred exclusively to the legislature. In the United States, every member of a legislative body, when voting on a pending measure, answers two questions: first, "Is it constitutional?" and, second, "Is it expedient?" The latter of these is for the legislature alone, and its decision thereon is absolutely final. Its action may be repealed by a subsequent assembly. It cannot be revised by any other tribunal. Upon the former of the two questions, the decision of the legislature, while *prima facie* binding and correct, is yet subject to review, and, in clear cases, to reversal by the judiciary. But even this question of constitutionality may be affected by the same or similar considerations as the other matter of legislative expediency. This is emphatically true of cases arising under the Fourteenth Amendment. That article is aimed, roughly speaking, at any arbitrary and oppressive legislation. Now, the purely legislative question of expediency includes the propriety and justice of any proposed enactment; and the question whether a measure is unjust often involves matters peculiarly suited for legislative, and correspondingly unfitted for judicial, consideration. Yet arbitrariness is only a high degree of injustice; and, therefore, in determining whether a measure is arbitrary and so in conflict with the Fourteenth Amendment, the legislature in the first instance and the courts, so to speak, on appeal, are obliged to weigh the identical arguments, pro and con, which are pertinent to the purely legislative question of expediency and justice.² The courts, therefore, when considering the Fourteenth Amendment and kindred topics, ought not, on principle, to reject facts and arguments simply because they relate to the question of expediency — expediency, that is, in the sense of true, just, and moral expediency.

the conditions of business, so far as railroad corporations are concerned, have probably changed for the better since the decree below, and that the rates prescribed by the statute of 1893 may now afford all the compensation to which the railroad companies in Nebraska are entitled as between them and the public. . . . If the Circuit Court finds that the present condition of business is such as to admit of the application of the statute to the railroad companies in question without depriving them of just compensation, it will be its duty to discharge the injunction heretofore granted." 169 U. S. 549, 550.

¹ See *supra*, note (3) *ad finem*.

² See *Smyth v. Ames*, 169 U. S. 466.

They should not scruple to sustain a law, although under other conditions a similar act may have been held in conflict with the Fourteenth Amendment, and *vice versa*. They should not be frightened because the differences between the facts on which the cases respectively arise are "purely legislative." They should further inquire whether the differences, which of course are legislative, are of sufficient magnitude and importance to turn the scale in deciding whether or not the act is arbitrary and glaringly unjust.

The difficulty of determining the precise point at which the changes in the facts of the case may properly make a difference in the decision of the court is unquestionably enormous. It is always extremely difficult to draw a sharp line between cases which gradually shade into one another. One cannot say precisely what statutes should be held arbitrary even on a given state of facts;¹ and the difficulty is intensified a hundredfold where the facts are constantly changing, now slowly, now with almost startling rapidity. Indeed, the Supreme Court expressly refuses to lay down any general rule, and contents itself with determining, as each case is presented, on which side of the line it falls.² This is clearly the proper mode of procedure. The difficulties of reaching a decision are increased rather than lessened by putting hypothetical cases which lie close to the line. In *Brass v. Stoeser*,³ the question in that way was needlessly obscured. After stating the argument that the regulation of elevators in large cities like New York and Chicago was widely different from the regulation of the same business in small country towns, so that the one might be valid and the other unconstitutional, the court said:⁴ "It can scarcely be meant to contend that the statutes of Illinois and New York, valid in their present form, would become illegal if the law-makers thought fit to repeal the clauses limiting their operation to

¹ *Atchison, Topeka & Santa Fé R. R. Co. v. Matthews*, 174 U. S. 96, 105, 106.

"This phrase, 'due process of law,' never has been defined, and probably never can be defined so as to draw a clear and distinct line applicable to all cases between proceedings which are by due process of law and those which are not." Per Miller, J., in *Freeland v. Williams*, 131 U. S. 405, 418.

² "There is wisdom, we think, in the ascertaining of the intent and meaning of such an important phrase in the federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." *Holden v. Hardy*, 169 U. S. 366, 390. The same rule has been laid down as to the clause relating to "privileges and immunities of citizens in the several states." *Conner v. Elliott*, 18 How. 591, 593.

³ 153 U. S. 391. See *supra*, p. 277.

⁴ 153 U. S. 391.

cities of a certain size, or that the statute of North Dakota would at once be validated if one or more of her towns were to reach a population of one hundred thousand, and her legislature were to restrict the operation of the statute to such cities." No doubt, the decision in *Brass v. Stoeser* was perfectly correct. No doubt, the differences between that case and *Budd v. New York*¹ were not enough to affect the constitutionality of the act. It is merely against the method of reasoning that this protest is entered. To imagine a series of minute variations from the facts of a former case, and then to argue that the first case of the series is not materially different from the original case, nor the second from the first, nor the third from the second, and so on, and that therefore the difference between the last of the series and the original case is immaterial, is a repetition of the ancient sophism of the *sorites*.² The important point is to keep clearly in mind that circumstances alter cases, that a statute which on one state of facts is just and proper may on another state of facts be arbitrary and void, and that this doctrine involves no departure from the intention of the framers, nor any adoption of a shifting, variable construction of the Constitution.

It should be observed that when in this connection matter of fact is spoken of, the term includes all matters of ordinary municipal law — everything, that is, except constitutional law. The Constitution is a *lex legum*. In applying its provisions to laws of inferior obligation, the latter are to be regarded as facts. Consequently, a law may be valid in one State and contrary to the federal Constitution in another because of a difference in domestic law — for example, in the law of property — in the two jurisdictions. Thus, riparian lands in Louisiana are subject to an easement in favor of the state for the construction of levees. When, therefore, in Louisiana such structures are erected, the owners of the soil are not entitled to compensation, for the state is merely exercising its easement.³ But in Massachusetts, or Maryland, the

¹ 143 U. S. 517.

² "For example, I ask, Does one grain of corn make up a heap of grain? My opponent answers, No. I then go on asking the same question of two, three, four, and so on *ad infinitum*, nor can the respondent find the number at which the grains begin to constitute a heap. On the other hand, if we depart from the answer, — that a thousand grains make a heap, — the interrogation may be carried downward to unity, and the answerer be unable to determine the limit where the grains cease to make up a heap. The same process may be performed, it is manifest, upon all the notions of proportion in space and time and degree, both in continuous and discrete quantity." Sir William Hamilton, *Lectures on Logic*, p. 332.

³ *Eldridge v. Trezevant*, 160 U. S. 452.

law of property is different. Riparian lands are subject to no such servitude. The legislatures, therefore, of those States, could not authorize the building of levees along the shores of the Merrimac or the Potomac without compensating the persons whose lands would be appropriated.

Whether any given change of circumstances is or is not material often depends on the answer given to questions of construction. The ratification of constitutional amendments will again serve as an example. The provision that a proposed amendment must, before taking effect, be ratified by "three fourths of the several States" is universally and properly taken to mean three fourths of the number of States for the time being; but it is conceivable that the same words might mean three fourths of the original number of States. If that construction were to be adopted, the increase in the number of States would of course be immaterial; and ten commonwealths would still, as at the formation of the Union, enjoy the power to alter the supreme law of the land.¹

Similarly, wherever the Constitution, expressly or by implication, refers to custom or opinion, the framers may have meant that prevailing either when the instrument was adopted or when it was interpreted and applied. If the latter construction be adopted, a change in custom or opinion might make a difference in the constitutionality of a statute. Otherwise, it could have no such effect. Thus, the Eighth Amendment forbids "cruel and unusual punishments." Does this mean unusual when the amendment was adopted, or unusual when the punishment is inflicted? The word was capable of either meaning. If the latter be correct, the lapse into disuse of a punishment formerly prevalent may be material in deciding whether at the present day it falls within the inhibition of the amendment, and a punishment once legal may perhaps be held now unconstitutional. If, however, the other construction be chosen, the frequency or infrequency with which the particular penalty is now imposed becomes wholly irrelevant.

The phrase, "due process of law," furnishes another instance of the same ambiguity. Whether a law is arbitrary and so not "due process" is largely a matter of opinion. In the Middle Ages, or

¹ It is a curious fact that, under the Confederation, the more important measures required in the Congress the assent of nine states and not in terms of two thirds. Article IX. of the Articles of Confederation. It was pointed out by Alexander Hamilton in the *Federalist* (No. XXII.) that, by the admission of a number of new states, this provision would lose a large part of its effectiveness. Nine states would no longer be the equivalent of two thirds of the whole number.

even in the eighteenth century, public sentiment tolerated many laws which would be utterly abhorrent to the spirit of the present period. The objective facts may be precisely the same. The evils of the legislation in question may have existed in an equal degree then as now. The only difference may be that in days gone by public opinion winked at many hardships which would not now be overlooked. The question, then, arises by what standard the reasonableness of a law is to be determined. Is the norm to be the opinion of the average reasonable man of the eighteenth century, or of the time in which the statute is enacted? In other words, does the Constitution forbid legislation which the reasonable man of that age would judge arbitrary as applied to whatever objective facts may exist when the law is adopted and enforced, or does it prohibit governmental action which is arbitrary according to the estimate of the intelligent reasonable man of the date of the passage of the law? According to the authorities, it seems that the former is the correct view. In the leading case on the subject,¹ the rule was distinctly laid down that any act is valid which accords with "those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." This doctrine does not prevent an act which was reasonable and proper during the period intervening between Magna Charta and the American Revolution from becoming arbitrary and void by reason of the disappearance of the facts on which its reasonableness depended. It does seem to include the proposition that no proceeding or enactment can be held no longer "due process" simply because the general sentiment of the intelligent public has become less tolerant of wrong and more sensitive to injustice.²

For example, special assessments for local improvements are now upheld in spite of many acknowledged evils and of the great

¹ *Den v. Murray v. Hoboken Land Co.*, 18 How. 272, 277.

² Of course, the mischiefs attendant upon a certain law or practice may have existed from the earliest times, but may have only recently been discovered and brought to the attention of the people. In such cases the objective facts have undergone no change; yet the court might declare that the formerly prevalent belief in the reasonableness of the law of practice was erroneous, and that the process had all along been unconstitutional. Yet it should be a remarkable occasion to warrant such a course. However, in this connection, compare *Stone v. Mississippi*, 101 U. S. 814, with *Dartmouth College v. Woodward*, 4 Wheat. 518.

possibility of abuse to which that form of taxation is peculiarly liable.¹ It is the general opinion of the public that on the whole the advantages outweigh the disadvantages; and, therefore, the courts are now unable to say that the levy of special assessments is a taking of property without due process of law. But suppose, while the amount of injustice which such assessments cause remains constant, the sentiment of the people undergoes a revolution, so that such taxation should come to be thought by all intelligent, reasonable men absolutely barbarous. Could the courts then pronounce special assessments a violation of the Fourteenth Amendment? It would clearly seem not, as the authorities now stand.² The test to be applied is whether the framers of the Constitution — that is, the intelligent, reasonable men of their day — would regard the statute in question, as applied to the facts in existence at the time of its passage, as wholly arbitrary and outrageous.³

It would seem that this rule must work both ways, so that any proceeding which was formerly thought arbitrary cannot be now sustained merely because, by a change in popular sentiment, it is at the present time thought permissible. It by no means follows that no proceeding can be regarded as due process unless it can show the sanction of usage prior to the adoption of the Constitution; and this is so even when no change has occurred in the facts on which the reasonableness of the law is to be judged. Many things were formerly thought permissible which were never actually adopted. It is therefore within the power of the states to substitute a prosecution on the sworn information of the attorney-general for the common law method of procedure by indictment of a grand jury.⁴ This is so because the proceeding by information, while not in vogue in America at the time of the Revolution, is yet reasonable and just as well to the government as to the accused, and would have been so deemed by the framers of the Constitution and of the Fourteenth Amendment. If the indictment of a grand jury had been thought by those statesmen absolutely indispensable

¹ *People v. Mayor, etc. of Brooklyn*, 4 N. Y. 419; *Spencer v. Merchant*, 125 U. S. 345.

² But see *Norwood v. Baker*, 172 U. S. 270. It is undeniable that in this case the court held a tax unconstitutional which even a few years ago would universally have been sustained. See *Davidson v. New Orleans*, 96 U. S. 97; *Spencer v. Merchant*, 125 U. S. 345; *Lent v. Tillson*, 140 U. S. 316.

³ But see *Holden v. Hardy*, 169 U. S. 366, 385-389.

⁴ *Hurtado v. California*, 110 U. S. 516.

to any fair and proper trial for the more serious offences, then the change in the sentiment of the people in that regard would seem immaterial, and a conviction for felony on information merely would be illegal.

Because this is the interpretation given to the phrase, "due process of law," it does not follow that the analogous construction should be adopted for other clauses in the Constitution. For instance, we know that in the section regulating amendments, "three fourths of the several States" means three fourths, not of the original thirteen States, but of whatever may, for the time being, happen to be the total number of the United States. Moreover, it is not clear that "unusual punishments" in the Eighth Amendment does not mean punishments which shall be unusual when imposed. All the familiar arguments in favor of an "elastic constitution" may be urged in support of that construction. The fact that the Constitution was intended to endure perpetually, the importance of leaving the legislature, so far as possible, free to adopt such measures as the sentiment of the people may permit or require — these are legitimate reasons for interpreting "unusual" to mean unusual when the penalty is exacted.¹ Whether they are convincing is a different question, which in no way concerns the present subject. Suffice it here to say that either interpretation is permissible, and that either may be adopted without conflicting with the sound theory of constitutional construction; and that the same thing is true in other similar cases.

Nevertheless, it must never be forgotten that by adopting the elastic, flexible construction of such terms as "unusual," the court does not decide that those words must be interpreted in whatever sense they may bear when construed. That we have already seen to be inadmissible.² They do not say that if "unusual" should, by some linguistic somersault, come to mean customary, then the amendment should be taken to forbid "cruel and customary punishments." On the contrary, the interpretation of the word should coincide with the meaning which it bore when incorporated into the instrument; but it may be that such meaning was equivalent to "whatever may be at the time the punishment shall be inflicted uncommon or infrequent." Whether that was really the meaning is an ordinary question of interpretation.

¹ This seems to be the construction approved by Judge Cooley. Cooley, Const. Lim. *330.

² *Supra*, p. 204.

In conclusion, it may be well to summarize what seem to the writer to be the sound doctrines governing the application of the Constitution to the novel circumstances and unprecedented problems in which the people of the United States are now so deeply involved. The fundamental principles may be briefly recapitulated in three propositions :—

I. The intention of the framers as evidenced by the reasonable construction of their words, excluding cases settled by prior decisions, and, if the question be political, by the result of war, must always prevail.

II. The construction of the Constitution, being dependent on the unchanging intention of the framers, should never vary.

III. While the construction of the Constitution is invariable, a measure which is unconstitutional at one time may be valid at another time, and *vice versa*, by reason of a change in the facts to which it is to be applied.

The elasticity, then, of the Constitution consists, not in a "capacity for change independent of formal amendments," but in a liberal and statesmanlike construction which will leave the government free play for all just and legitimate measures even in times of the greatest national peril. The Constitution and its construction is not elastic or flexible ; it is firm, unyielding, and permanent. The unaltering intention of the framers must, indeed, therefore be respected ; but if to the search for such intent we bring a clear vision, sound legal learning, and real statesmanship, it will be found that the wise patriots who formed the American Union have rarely restrained the government which they created from any measure which ought ever to be employed. This is true even after the lapse of more than a century, and after the enormous and unexpected developments of those eventful years. The true construction of the Constitution will be found to prevent only what is wrong and enjoin only what is right.

These being the principles by which our fundamental law must be administered, at the present time when a departure from traditional policies is being inaugurated, the importance of holding fast to the Constitution in its just and reasonable construction can hardly be over-emphasized. Strive as we may, it is impossible to place ourselves in the position of those who framed the instrument, and interpret it as they would have done. We cannot eradicate from our minds the knowledge of the momentous historical events which elapsed during the past century. We may recognize that these facts should not influence our interpretation of the Con-

stitution, yet unconsciously the judgment will be warped thereby. When, therefore, the danger of inadvertent errors is so great, at all events we should profess sound doctrine, and, avoiding all conscious deviations, exert ourselves, so far as possible, to adhere to the course which, in the abstract, our judgment approves.

Especially is this true at a time when the politicians of both parties are uttering much nonsense under the guise of constitutional argument. On the one hand, caution is necessary lest the desperate straits of a political organization should fasten upon us a more narrow and restrictive construction of the Constitution than the law demands. On the other hand, the people should see to it that so-called statesmen, in their eagerness to obtain a personal or partisan advantage, or even from a sincere desire to advance the public interests, shall not depart from that construction of the instrument which the fathers would have approved. The Constitution is the link which binds us to a glorious past. The Declaration of Independence may be abandoned, if it be deemed out of date, without, perhaps, doing violence to our laws and institutions. But the Constitution is the supreme law of the land; and to that at least we must adhere. Its infraction is partial anarchy; and its abolition — if the imagination can conceive of such a thing — is the destruction of the government of the United States.

Arthur W. Machen, Jr.

BALTIMORE, MD., March 19, 1900.

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THE LAW SCHOOL. — The following table shows the registration in the school on November 15 for twelve successive years: —

	1889-90.	1890-91.	1891-92.	1892-93.	1893-94.	1894-95.
Res. Grad.	—	—	—	—	—	—
Third year	50	44	48	69	66	82
Second year	59	73	112	119	122	135
First year	86	101	142	135	140	172
Specials	59	61	61	71	23	13
Total	254	279	363	394	351	402
	1895-96.	1896-97.	1897-98.	1898-99.	1899-1900.	1900-01.
Res. Grad.	—	—	1	1	—	1
Third year	96	93	130	102	134	144
Second year	138	179	157	169	193	202
First year	224	169	216	218	232	241
Specials	9	31	41	58	51	58
Total	467	472	545	548	610	646

As usual there is an increase in the total registration. Each of the three classes is larger than in any previous year. Of the third year class only 14 per cent. have not returned, as against 21, 32, 28, 36, 30, 34, and 44 per cent. respectively, in seven preceding years. The second year men not returning form 21 per cent. of the whole class as against 12, 25, 7, 23, 28, 24, and 27 per cent. in previous years.

The number of men who withdrew or did not take their examinations last year was 11 per cent. of the first year class and 4 per cent. of the second year class, as compared with 10, 16, and 6 per cent. and 7, 9, and 3 per cent. respectively for the three previous years.

The following are the usual tables showing the sources from which eleven successive classes have been drawn, both as to previous college training and as to the geographical districts from which they have come : —

Class of	HARVARD GRADUATES.			Total.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	
1893	34	1	19	54
1894	30	2	17	49
1895	32	4	13	49
1896	23	7	17	47
1897	27	2	15	44
1898	42	1	25	68
1899	45	6	19	70
1900	50	11	30	91
1901	45	3	28	76
1902	59	2	28	89
1903	43	4	28	75

Class of	GRADUATES OF OTHER COLLEGES.			Total.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	
1893	5	9	21	35
1894	7	20	38	65
1895	8	14	30	52
1896	14	11	45	70
1897	9	12	56	77
1898	19	23	62	104
1899	21	12	45	78
1900	30	19	60	109
1901	27	22	59	107
1902	22	29	61	112
1903	23	26	83	132

Class of	HOLDING NO DEGREE.			Total.	Total of Class.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.		
1893	4	1	7	12	101
1894	20	1	10	31	142
1895	16	3	14	33	135
1896	10	4	9	23	140
1897	26	7	16	49	170
1898	25	2	25	52	224
1899	11	2	8	21	169
1900	11	2	3	16	216
1901	25	—	9	34	218
1902	18	4	9	31	232
1903	21	1	12	34	240

The thirty-four men in the first year class who hold no degree are Harvard seniors on leave of absence. They have, however, save in four instances, completed the work required for the Harvard A. B. Thus it may be said that all the members of the first year class are virtually college graduates, as are 98 per cent. of the whole number of men registered in the school. Of the fifty-eight special students in the school, thirty-eight are here for the first time this year, and of these eleven are non-graduates, four are graduates of law schools, and the remainder are college graduates.

There are now in the school graduates of eighty-two universities and colleges, as compared with seventy-six last year. The following forty-

seven universities and colleges have conferred their first degrees on members of the entering class, the figures indicating the number of men from each college when there are more than one: Harvard (75), Yale (29), Brown (13), Dartmouth (9), Bowdoin (6), Chicago (5), Princeton (5), Washington and Jefferson (4), Amherst (4), California (4), Bates (3), Georgetown (3), Iowa College, (3), Johns Hopkins (3), Northwestern (3), Western Reserve (3), Wisconsin (3), Beloit (2), Cornell (2), Leland Stanford, Jr. (2), Michigan (2), Nebraska (2), Union (2), Connecticut Wesleyan (2), Williams (2), Alabama, Baylor, College of the City of New York, Colby, Creighton, Denison University, De Pauw, Illinois, Iowa University, Kenyon, Lehigh, Manhattan, Marietta, Massachusetts Institute of Technology, Minnesota, New Brunswick, St. Johns, St. Lawrence, Tufts, Waynesburg, Wooster, Worcester Polytechnic Institute.

GAME LAWS AND THE COMMERCE CLAUSE. — The effect of a fisheries or game law prohibiting the possession of certain fish or game during the close season has recently been considered in the New York Court of Appeals. To proceedings brought for a violation of the statute the defence was set up that the fish in question had been imported from Canada, and the court by a bare majority gave judgment for the defendant. Four judges held that by a fair construction of the act it was not intended to cover the present case, but merely prohibited the possession of fish or game caught or killed within the state. Three of them went further and said that if the statute were to be construed as covering fish and game captured or killed outside the state, it was unconstitutional. The three dissenting judges held that this statute was a legitimate exercise of the police power, and that it was not invalidated by the fact that its operation might indirectly interfere with commerce beyond the boundaries of the state. *People v. The Buffalo Fish Co.*, 164 N. Y. 93. The same point was lately raised in a federal court in regard to a Washington statute, which prohibited all sale of certain game within the state. The act was held invalid as being an interference with interstate commerce. *In re Davenport*, 103 Fed. Rep. 540 (Cir. Ct., Wash.).

It is settled authoritatively that the states may not legislate in regard to foreign or interstate commerce save on matters of purely local concern. If the subject-matter of the law admits of only one uniform system throughout the country, the legislative power of Congress is exclusive. Accordingly, acts of a state prohibiting all sales of intoxicating liquors, oleomargarine, etc., have been held unconstitutional. *Leisy v. Hardin*, 135 U. S. 100; *Schollenberger v. Pennsylvania*, 171 U. S. 1. Until a commodity has been sold, or used, by its importer it is considered as still being an article of commerce, and it is not, therefore, within the legislative control of the state. Thus, in the absence of congressional authority, a state may not forbid the sale of an imported article in the original package. On the other hand, a statute prohibiting the sale of oleomargarine so colored as to resemble butter has been upheld by the Supreme Court on the ground that it merely prevented the practice of a fraud upon the public and was therefore within the police power. *Plumley v. Massachusetts*, 155 U. S. 461. Again, in considering a statute which prohibited the exportation of game killed within the state, that court has expressly held that owing to the duty of the state to preserve for its people

a valuable food supply, the right to protect game is within the police power of a state, and that this power "may be none the less efficiently called into play because by so doing interstate commerce may be remotely and indirectly affected." *Geer v. Connecticut*, 161 U. S. 519.

As to the matter of construction in the New York case, the words of the statute are explicit, and a previous New York statute on the subject, which is similarly phrased, has been held to cover imported game as well as that killed within the state. *Phelps v. Racey*, 60 N. Y. 10. Hence the view of the majority of the court on this point seems open to criticism. In regard to the more general question as to the right of a state to prohibit the possession or sale of imported game, the narrow distinctions made in some of the more recent cases appear to leave it open to doubt whether the Supreme Court might not find reason to treat this case as another exception to the harsh rule of *Leisy v. Hardin*. Moreover, Congress has never expressly legislated in regard to this particular subject. It would seem, therefore, that the supervision of the whole matter rests not with the judiciary, but with Congress, for it is to that body that the Constitution has intrusted the power to regulate interstate and foreign commerce. 2 Thayer's Cases on Constitutional Law, 2191.

SUIT BY CORPORATION FOR SLANDER OF ITS OFFICER. — The great and ever increasing number of corporations assuming all the functions of individuals has created a tendency in modern decisions to assimilate as far as possible the rights and duties of corporations to the rights and duties of natural persons. This tendency is marked by the fact that it is law today that a corporation may sue or be sued in actions of such personal nature as deceit, libel, and slander. Morawetz on Corporations, 2d ed. vol. 2, p. 727.

Brayton v. Cleveland Special Police Co., 57 N. E. Rep. 1085 (Ohio), was an attempt on the part of a corporation to recover damages for loss of business due to the defendant's defamation of its general manager and treasurer. The case may be considered from two points of view: as an action of slander based on the theory that the slander of the general manager involves a slander of the corporation, or as a special action to recover for consequential injuries resulting from the slander of a third person. On the first view the case fails, as is pointed out by the court; an action of slander is personal, and can only be brought by the person directly defamed. The second view presents the question as to whether an action on the case can be maintained for consequential injuries due to the slander of a third person, where the injuries so resulting were intended. The general rule is that such an action will not lie; the reason usually stated being that it is impossible to satisfy the court that the defamatory words were the legal cause of the injuries. Odgers, Libel and Slander, 3d ed. p. 15. An English court, however, has allowed a recovery in an action by a grocer for damage to his trade, resulting from the slander of his wife who worked in his shop. *Riding v. Smith*, L. R. 1 Ex. 91. He did not sue for an implied slander to himself in his trade, but for the damage to his business, the legal cause of which was the defendant's wrongful act. On the strength of this decision the Circuit Court of Ohio gave judgment for the plaintiff in the principal case. The Supreme Court, however, distinguished the case from *Riding v. Smith*, *supra*, on the ground that the slander of Maher

(the general manager and treasurer) was made of him as an individual, and not in his business capacity, while in *Riding v. Smith* the slander of the wife was made "in relation to the business" of her husband, and reversed the decision. Such a distinction seems of little importance on principle. If the defendant, intending to injure the corporation, slandered Maher, and the intended injury resulted as a natural consequence of his words, it is immaterial whether he slandered Maher as an individual, or as the manager of the corporation. The test of the action is not whether there is an implied slander, but whether the wrongful misstatement can in a legal sense be said to cause the injuries sustained. This is the test applied in *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, where a boiler-maker sued for general loss of trade due to a false publication that he had given up his business. The court held that although the words were not libellous or defamatory, an action on the case was maintainable, as the injuries were the natural and probable consequence of the false statements. If courts will allow recovery in such a case, it is difficult to see on principle why under some circumstances an action should not lie for injuries of which the slander of a *third* person is the proximate and predominating cause. See 14 HARVARD LAW REVIEW, 184.

DEATH BY WRONGFUL ACT. — While the language of the statutes doing away with the civil immunity of a tortfeasor whose wrongful act results in death varies more or less in different jurisdictions, the courts are practically agreed that any act by the party injured which, had he lived, would be a bar to his suit for the injury, will also be a bar to a suit under the statute by his personal representative. But even under similarly worded statutes widely different reasoning has been employed in reaching this admittedly desirable result. By many it has been thought to depend on the question whether a new right of action was given by the statutes to the personal representative of the deceased, or whether they merely provided for a survival of the action that at common law died with the party injured. In England, after some doubt, Lord Campbell's act was held not to give a new cause of action, and hence a release by the decedent, even before any injury, was a bar to a suit under the statute. *Haigh v. Royal Mail S. P. Co.*, 5 Asp. M. C. 189. In this country the courts, though in the main repudiating the doctrine that no new right of action is given, generally reach the same result as the English court by a more or less strained construction of the statutes — seizing hold of phrases such as the common provision that an action lies "if the neglect, etc., is such as would have entitled the party injured to maintain an action" as indicating the intention of the legislature to be that if for any cause the party injured could not have sued, there is a good defence to an action by the personal representatives. *Littlewood v. Mayor, etc. of New York*, 89 N. Y. 24. But even under a statute with no such ambiguous provisions, the same result was reached in a recent case by a court which at the same time admitted that the statute gave a new cause of action. *Southern Bell Telephone Co. v. Cassin*, 36 S. E. Rep. 881 (Ga.). The plaintiff's husband released the defendant from liability for personal injuries due to the defendant's negligence. Five years later, upon these injuries resulting in death, the plaintiff brought suit under the statute. The court held the release a bar on the ground that the wife was privy to

the husband and therefore estopped by his release, and, further, that "payment, like pardon, relates back to the original act and makes it as though it never had been." This idea of estoppel against the wife seems entirely unsound. Indeed, the court's premise that the statute gives the personal representatives a new right of action is fatal to this estoppel theory. On the other hand, the court seems correct in holding that a new right of action is given by the statute. For not only is the amount recovered not assets in the hands of the administrator, but the measure of damages generally adopted — the actual loss to the deceased's family — is strong to show that the statutes do not merely provide for a survival of the deceased's right of action. Were this the case, damages for the deceased's physical suffering should be allowed, as the fact that the wrongful act resulted in death is surely no ground for a decreased liability on the tortfeasor. The terms of the Georgia statute are singularly broad, and if the decision can be supported at all, it must be upon the ground that the statute is one of a series intended to defeat the operation of the maxim, *Actio personalis moritur cum persona*, and therefore may be so construed that while fully effecting this purpose, it will not contravene the general policy of the law, — to encourage the compromising of actions. But it would seem to be rather a cavalier treatment of a statute which without any qualification gives the personal representatives a new right of action to read into it a proviso that what would be a defence against the party injured will also defeat this right.

THE DISSEISIN REQUISITE TO SUPPORT EJECTMENT. — In a recent case the defendant, a street railway company, without any legal authority, put its tracks on a highway over the plaintiff's land. In a former suit, two years after the road was in operation, the plaintiff sought a mandatory injunction to have the tracks removed. On equitable grounds the injunction was refused, though the defendant's trespass was admitted. The plaintiff now plants himself firmly on his legal right, and brings an action of ejectment. The court refuses to allow the action on two grounds: First, that as the plaintiff was never entitled to the possession of the soil in the highway, he cannot be said to have been excluded or disseised; and, second, that the defendant's act was merely the illegal or excessive user of an admitted easement of public travel, which would only give a right in trespass for damages. *Becker v. Lebanon, etc. St. Ry. Co.*, 46 Atl. Rep. 1096 (Pa.). The first objection is contrary to the usual doctrine in regard to public rights of way. The general rule is that the owner of the fee of a highway is entitled to protect his rights by every species of action and remedy which would be open to him if his land were disincumbered of the way. Angel on Highways, § 519; *Thomas v. Hunt*, 134 Mo. 392. The plaintiff has a right to have his land restored subject to the public easement; the mere fact that absolute possession cannot be restored is immaterial. The second ground on which the court relies raises the question as to whether or not a street railway company in laying its tracks on a public way can be said to disseise the owner of the fee in such a sense as to allow the action of ejectment. It must be admitted that a railroad assumes a right in the nature of a right of way. There is no claim of freehold, and the passing of trains is only occasional, like the passing of teams over a highway. It differs, however, from the ordinary right of way in that a permanent structure is put upon the servient

tenement, and the nature of the user totally excludes the owner from a part of his land. Instances exactly similar to the principal case have arisen concerning steam railroad tracks laid without authority along a street. It has generally been held that the owner of the fee of the street can maintain ejectment, the acts of the railroad being considered a sufficient ouster to support the action. *Carpenter & Oswego, etc. R. R.*, 24 N. Y. 655. As regards the nature of the ouster requisite in ejectment it is almost impossible to frame an exact rule, the authorities vary so in different jurisdictions. It might be suggested as a test that the ouster must be a permanent trespass, of a kind to substantially exclude the owner from a part of his fee. Ejectment has been allowed, however, for the projection of eaves, roof, and walls. *Murphy v. Bolger*, 60 Vt. 723. The Supreme Court of Illinois goes so far as to hold that where a telegraph company put its poles along a highway without compensating the owner of the fee, the latter may maintain ejectment for their removal. *Postal Telegraph Cable Co. v. Eaton*, 170 Ill. 513. If ejectment will lie under such circumstances, it is difficult to understand the ground for refusing the action in the principal case. The case is very briefly and unsatisfactorily reported, but on the facts given it seems impossible to support the decision.

LIABILITY OF MUNICIPAL CORPORATIONS FOR TORTS. — Although there has been much litigation in our courts concerning the liability of municipal corporations for torts, the question is still involved in confusion. A recent decision by the New Hampshire court is therefore of value, not only for its full discussion of the subject, but also for its sound reasoning. The plaintiff, employed in the city of Concord waterworks, was injured by the negligence of the city's agents. The court held that the city could not escape liability either on the ground that it was a municipal corporation, or that to a certain extent the undertaking was governmental. *Rhobidas v. City of Concord*, 47 Atl. Rep. 82 (N. H.). The principal case is in accord with *Mulcairns v. City of Janesville*, 67 Wis. 24.

Most state constitutions provide that no private property shall be taken for public purposes without compensation. This provision rests upon the broad ground that if, as a result of a public undertaking, one man suffers, he should be repaid by all. Following out this principle, courts have held that where a property right of a citizen is in any way invaded during a public undertaking, he should be recompensed. *Ashley v. City of Port Huron*, 35 Mich. 296; *Nerins v. City of Peoria*, 41 Ill. 502. In both the cases cited, the ground of the decision was a recognition of the principles of natural justice which underlie the constitutional provision. It makes no difference in such a case whether the city was acting in its private corporate capacity or as a subdivision of the government. There is, however, an exception to this rule in those cases where the act is done by one who, though nominally the agent of the city, in reality is not, such as a police officer or a fireman. If this right to compensation is once recognized, there seems to be little reason why it should be confined to trespasses upon property. Whenever a private right is infringed as a result of a public work, particularly if it is an aggressive misfeasance, the same principle of equality should govern and compensation should be made. This is the position taken by the court in the principal case, and it seems to be the logical basis of liability. Certainly one great source of

confusion is eliminated, when it is no longer necessary to make a distinction between the public or governmental capacity and the private or corporate capacity of a municipal corporation. The authorities make it necessary, however, in such a case, to distinguish between a private right, recognized by the common law, and the right which a man receives, in common with all the public, and which depends upon the discharge of a purely governmental function, as in *Eastman v. Meredith*, 36 N. H. 284. The report of the principal case unfortunately does not give the circumstances of the injury so as to make it apparent whether the court would restrict the liability to acts of positive misfeasance. However, it is probable that no such refinement will be made. The modern tendency undoubtedly is to recognize that the duty to maintain property in a safe condition is in all cases purely a private and local duty, and that it makes no difference whether it is public and governmental property or property owned as a private corporate body. Goodnow on Municipal Home Rule, 176.

INJUNCTIONS AGAINST CRIMINAL PROCEEDINGS.—It was the old idea, founded largely on a *dictum* of Lord Hardwicke's in *Lord Montagu v. Dudman*, 2 Ves. Sen. 396, that courts of equity had no jurisdiction to enjoin criminal proceedings of any sort. Although there are many modern decisions to the same effect, such injunctions have been granted in a large number of comparatively recent American cases, in which it appeared that irreparable damage to property would result if the criminal proceedings were allowed to go on. *Central Trust Co. v. Citizens' St. R. R. Co.*, 80 Fed. Rep. 218. In a recent Georgia case, though it does not appear that irreparable damage was threatened, the court manifested a disposition to follow the old authorities to their full extent. *City of Bainbridge v. Williams*, 36 S. E. Rep. 935. Those who take the opposite view contend that where the element of irreparable damage is present, and the complainant further satisfies the court that the final judgment in the criminal suit, if reached, ought to be in his favor, equity, though having no jurisdiction in criminal matters *as such*, is not ousted of its ordinary jurisdiction, for the protection of property, because it happens that the damage threatened will be inflicted under the forms of criminal proceedings.

It is obviously no answer to this argument that the doctrine is new, for every department of our present equity jurisdiction was once an innovation. The objection, if any, must be a practical one, making the interference of equity clearly undesirable. Viewed in this light, the cases fall into two classes. In the first class the complainant relies on the invalidity of the statute under which proceedings are threatened, and the court of equity is therefore called upon to decide a pure question of law which the common law court must decide in the same form if the criminal proceeding is allowed to go on. There seems to be no practical objection to the settlement of that question by equity at the outset rather than by the court of law after irreparable damage has been done. In the second class of cases, in which the complainant relies simply on his innocence in fact of the offence charged, a new difficulty is presented. In order to grant the injunction in such cases, the court of equity must in effect try the complainant on the criminal charge, and, having found him not guilty, impose their decision upon the defendants, who are usually public officers

charged with the execution of the criminal law. *Davis v. A. S. P. C. A.*, 75 N. Y. 362. It may be argued that the machinery provided by the state for the administration of the criminal law, including the discretionary powers and duties of various officers and the forms of procedure and trial, is intended not only to safeguard the rights of the accused, but also to afford the best practicable protection against the injury to society, which is the essence of every crime; and that it is against public policy to allow one accused of an offence undoubtedly criminal to hamper or prevent, by means of a civil suit to which the state cannot be a party, the operation in his case of the machinery presumably best adapted to protect the public interest. This argument disappears if the interest of the state in the prevention of crime is equally well served by the equity trial. That is a question on which opinions may well differ, and on the settlement of which the jurisdiction of equity in this class of cases may properly be made to turn.

The distinction here drawn between two classes of cases, though suggested in a few of the decisions, is nowhere squarely laid down. But it is significant that in both classes of cases the decided weight of the actual decisions in this country supports the classification above suggested, while in England, where the question of the constitutionality of a statute cannot arise, there seems to be no case departing from the old rule. A solution which seems never to have been suggested by the courts, but which would apparently avoid most of the practical difficulties, would consist in allowing the injunction in the second class of cases only under such circumstances or in such form that the criminal action may still go to trial, without irreparable damage to property in the mean time. In all the cases which have yet arisen this might have been accomplished by proper procedure. Thus where the irreparable damage is threatened by repeated arrests on the same charge, the court might enjoin all but one arrest. If then the criminal trial resulted in conviction, it would be appropriate for the equity court to dissolve the injunction.

ACTION BY SERVANT WRONGFULLY DISCHARGED.—A servant who has been wrongfully discharged has two well-recognized remedies against his employer: he may regard the contract of employment as rescinded and sue for such services as he has actually rendered in an action for *quantum meruit*, or he may sue for damages for breach of the contract to employ. A third right, to sue on the special agreement to pay wages at such times as, according to its terms, they were to become due, is recognized in a recent Pennsylvania case, *Allen v. Colliery Engineers' Co.*, 46 Atl. Rep. 899. The plaintiff was hired by the defendant company as manager of its business for one year at a certain weekly salary. Later he was wrongfully dismissed. Two weeks after this dismissal, he sued and recovered the wages which should have been due him for the past two weeks. After the termination of the year, he brought the present action for the remainder of the wages promised him. The court held that the former recovery was no bar, as the plaintiff was entitled to treat the contract as still existing, and to sue for wages as they became due, "his readiness to serve being considered as equivalent to actual service." The defendant, however, had only promised to pay for services rendered, and the plaintiff's rendering of them was an implied condition of his right to

receive wages. This condition is apparently regarded by the court as waived by the defendant's refusal to accept. But a true waiver is where one party says that, in spite of the other's breach, he will continue the contract. Here the defendant does not say that, in spite of the plaintiff's enforced non-performance, the contract shall continue, but openly declares it shall not be completed. The condition, then, cannot be considered as waived, and as it has surely not been fulfilled, the plaintiff is not entitled to recover wages, which were dependent on the condition. The defendant has, of course, broken his promise to employ, and for this breach the plaintiff may recover damages. But as in the first action he could have recovered for the breach of the entire contract, no second action should be allowed. The opposite conclusion, in addition to being theoretically wrong, logically leads to the unjust result that a discharged servant is under no duty to find other employment to reduce the employer's damages. His willingness to serve being equivalent to service, he would be entitled to full wages, whether or not he could find work elsewhere.

Several American jurisdictions have adopted the doctrine of the principal case. *Armfield v. Nash*, 31 Miss. 361; *Booge v. Pac. R. R.*, 33 Mo. 212. Most of the recent decisions, however, are opposed. *Alie v. Nordrau*, 44 Atl. Rep. 891 (Me.); *James v. Allen Co.*, 44 Ohio St. 226. The doctrine seems to have been adopted on the authority of an English case which allowed *indebitatus assumpsit* for wages, where readiness to serve was alleged. This decision has since been discredited in England. *Emmens v. Elderton*, 4 H. L. C. 645, and a recent case shows that there would likewise be no recovery on the agreement to pay wages. *Bruce v. Calder*, [1895] 2 Q. B. 253.

RUNNING CABLE CARS WITHOUT LEGISLATIVE AUTHORITY. — An interesting question is involved in *Chicago General Ry. Co. v. Chicago City Ry. Co.*, 57 N. E. Rep. 822 (Ill.). The defendant company, acting under a charter authorizing it to operate street cars by animal power, used an underground cable to run its cars. One of these cable cars collided with a car belonging to the plaintiff, whereupon the latter brought an action for the damage resulting. The court held that as there was no allegation of negligence on the part of the defendant, the declaration did not disclose a good cause of action.

The position taken by the plaintiff was that such a use of the streets without legislative authority was a public nuisance, and that he, having sustained special damage, was entitled to recover. This contention is supported by cases holding that the wrongful user of a highway, whether by a traction engine or an unauthorized tramway, is a public nuisance. *Powell v. Fall*, L. R. 5 Q. B. D. 597; *Regina v. Train*, 2 B. & S. 640. Undoubtedly, if a private person without legislative authority should build and operate a cable line through the streets of a city, he would be violating the rights of the public. It is doubtful if it helps much to call it a nuisance, as the term has always been very loosely applied by the courts. However that may be, the public has a right to free and unobstructed passage over the streets. A line of cable cars would not only obstruct the street to a great degree, but would also make such use by the public more dangerous. This would seem to be such an invasion of the rights of the public as to be unlawful, in the sense that one who suf-

fers special damage should have an action for redress. But while it would be *prima facie* unlawful, yet when a public convenience demands it, the legislature has authority under its police power to legalize such use in certain cases. *Sawyer v. Davis*, 136 Mass. 239. If the operation of cable cars without legislative authority by an individual would be illegal, it is hard to see why it should be any the less illegal if done by a corporation. The court, however, says that the question whether the corporation has exceeded its chartered powers can only be raised in a direct proceeding by the state, and not collaterally in a suit by a private person. This is a broad statement of a rule that is rapidly gaining ground in our courts. 36 Am. Law Register, New Series, 18. While there may be much necessity for such a rule in certain cases where the question of corporate existence is involved, yet it is hardly justified in the principal case, where the gist of the question is not whether the corporation's act is *ultra vires*, but rather whether the legislature has legalized an act which is *prima facie* unlawful, whether it be done by a corporation or by an individual.

COVENANTS FOR PARTY WALLS. — Where owners of adjoining lots covenant that if either party builds, one wall may be placed on their boundary line, and the other party on using such wall shall pay for half its value, it is clearly expedient that such covenants should be enforceable both by and against the original owners or their subsequent vendees. The possible claim that exists where one party builds a wall is so intimately connected with the land that it ought to pass with its ownership, and the person subsequently using the wall is the proper party to pay for its value. Wherever the point has been raised, the courts have held that the covenants at all events could not be considered as running with the land, as they were thought to constitute a burden which would not run at law, and an active duty which would not run in equity. Judicial ingenuity has therefore been taxed to find other reasons for enforcing the liability.

The English court has recently, for the first time, grappled with the problem. *Irving v. Turnbull*, [1900] 2 Q. B. 129. In this case the plaintiff's vendor and the defendant at different times bought adjoining lots from the same person, it being covenanted in both cases that walls of buildings should be on the boundary lines, and that a party subsequently using such a wall should pay for half its value. The plaintiff's vendor built, and when defendants made use of this wall, the plaintiff sued for half its value. The court held, though "with no great confidence," that as covenants had been made with the original owner by both parties, directly or indirectly, there was sufficient privity between them to establish an implied promise. This reasoning seems unsound. The defendant never contracted with the plaintiff, but merely used a wall standing on his own land, which was, therefore, his own property. Under these circumstances it seems impossible on principle to raise an implied promise.

The American cases in which the point has arisen have generally reached this same result by holding that such an agreement means that the party first building shall have property in the entire wall until payment for half its value. Thus a subsequent user takes the property of another and a promise to pay is implied. *Maine v. Cumston*, 98 Mass. 317; *Burlock v.*

Peck, 2 Duer, 90. But this doctrine has great faults. Such an agreement does not fairly mean that property in the whole wall shall be in the builder, nor can this property pass to a subsequent user by the mere payment of money unless regarded as personal property, which the agreement certainly does not intend. If liability is to exist, some better principle for its support must be found.

It is submitted that the covenant may fairly be held to run with the land where the agreement has regard to any wall that may be built, and not to a specific wall which already stands or is about to be built. Such a wall vitally affects the improvement of the land, for it encourages the adjoining owner to build, knowing he may very probably be repaid half the expense of his wall. When a wall is once built, the covenant does not pass into a mere contingent claim for money, as it is a promise, not to pay for half of that particular wall built, but for any wall which is used. It thus tends to encourage the building of a second wall should the first be destroyed. Nor should it come under the rule that covenants imposing a burden do not pass to subsequent vendees, a doctrine to protect vendors from disadvantageous incumbrances, for though it imposes an obligation to pay money under certain circumstances, it may yet on the whole be considered to a subsequent vendor's advantage, as it tends to the establishment of a permanent party wall of which he may make use on payment of half value. Thus it seems that as the covenant affects the land, and is not properly a burden, it can be held to run. Where, on the other hand, the covenant refers to a specific wall about to be built, on the completion of the wall it no longer affects the land. It becomes a mere collateral claim to pay money for the use of the wall, since it does not apply to the building of a second wall, should the first be destroyed. Such a covenant, therefore, after the completion of the wall, should not run to the vendees of either lot. The agreement in the principal case, however, seeming to contemplate no particular wall, ought properly to be regarded as running with the land, and as most party wall agreements are similarly framed, the desired result of passing the covenants to subsequent purchasers could thus, in such cases, be reached, with no departure from principle.

RECENT CASES.

AGENCY—LIABILITY OF PRINCIPAL—SCOPE OF AGENCY.—A telegraph operator in the employ of the defendant forged and transmitted a fraudulent message to the plaintiff. *Held*, that the defendant is liable for losses occasioned to the plaintiff thereby. *Bank of Palo Alto v. Pacific Postal Tel. etc. Co.*, 103 Fed. Rep. 841 (Cir. Ct., Cal.).

It is clear that in general a principal is only liable for those torts of his agent which he has expressly authorized, or which are the result of acts reasonably incidental to the agent's employment. Moreover, this liability is entirely independent of the agent's motive. *Howe v. Newmarch*, 12 Allen, 49. Outside of these limits, the agent alone is responsible for his wrongful acts. *Rounds v. Delaware, etc. R. R. Co.*, 64 N. Y. 129. Obviously a telegraph operator has no express authority to transmit fraudulent messages, and it seems equally evident that such acts cannot reasonably be a proper method of performing his duties. Accordingly, the principal case holds the master for what is apparently a purely personal act of his servant. This result is, however, not without some support by the authorities, where, as here, the principal is engaged in serving the public under such circumstances that his agent's acts must of necessity

be implicitly relied upon by the public. *McCord v. Western, etc. Tel. Co.*, 39 Minn. 181. These decisions can be supported, if at all, only on broad grounds of policy.

BANKRUPTCY — ASSIGNMENT UNDER STATE LAW — PREFERENCES. — After the National Bankruptcy Act of 1898, an assignment in insolvency was made to the plaintiff as trustee according to the Connecticut insolvency law. *Held*, that the plaintiff has no interest in the insolvent estate which enables him to set aside a fraudulent preference. *Ketchum v. McNamara*, 46 Atl. Rep. 146 (Conn.).

The court rests the case on the ground that the assignment to the plaintiff, being part of a proceeding under the Connecticut insolvency law, which had been superseded by the Bankruptcy Act, was void. *Harbaugh v. Costello*, 184 Ill. 110. It would seem, however, that though useless for purposes of proceeding under the Connecticut insolvency law, the transaction should still pass a good legal title as a common law assignment. *Boese v. King*, 108 U. S. 379. Nevertheless, the decision is correct. A preference is not a fraudulent conveyance within the statute of Elizabeth, *Cock v. Goodfellow*, 10 Mod. 489; and, therefore, the assignee has no power to attack it except under some operative bankruptcy or insolvency law. Since the plaintiff here claims to act only under the superseded state law, he clearly has no such power.

BANKRUPTCY — EXEMPTION FROM INVOLUNTARY BANKRUPTCY — FARMER. — The insolvent was engaged in raising cattle and hogs for the market, feeding them principally from grain and hay grown on his own land. *Held*, that he is a person "engaged chiefly in farming," and so cannot be adjudged an involuntary bankrupt. *Re Thompson*, 102 Fed. Rep. 287 (Dist. Ct., Iowa).

The Bankruptcy Act, § 4 b, exempts from liability to involuntary proceedings persons "engaged chiefly in farming or the tillage of the soil." This clause has recently been interpreted to mean those whose chief occupation is farming and tilling the soil. *Re Taylor*, 102 Fed. Rep. 728, 730. The principal case, however, holds that one engaged in the business of raising and selling stock, while not a tiller of the soil, is nevertheless included in the class of farmers, and so cannot be thrown into involuntary bankruptcy. The decision seems unfortunate. In England, a farmer dealing in cattle to a greater extent than is incidental to farming is considered a trader, *Ex parte Gibbs*, 2 Rose, 38; and under our Act of 1847, one engaged in a business requiring the purchase of articles to be sold again was a trader. *Wakeman v. Hoyt*, Fed. Cas. No. 17,051. An opposite construction, therefore, might well have been reached in this case, especially since the present act is remedial in its nature, and should be construed where possible so as to promote justice. *Re Luckhardt*, 101 Fed. Rep. 807, 809.

BANKRUPTCY — JURISDICTION — PLEADING. — The Bankruptcy Act of 1898, § 4 b, provides that "any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil," may be adjudged an involuntary bankrupt. *Held*, that a petition in involuntary bankruptcy which fails to show that the debtor is not within the excepted classes is demurrable. *Re Taylor*, 102 Fed. Rep. 728 (C. C. A., Seventh Cir.).

The opposing view, that such facts are merely matters of personal defence to be set up in the answer, has some support. *LOWELL, BANKR* 473. Likewise the prescribed form for a creditor's petition (Form No. 3) makes no provision for such an allegation. However, according to the principal case, the question is jurisdictional rather than personal, and the allegation in question is thus necessary to bring the alleged bankrupt within the terms of the statute. This decision is in accord with the general rule of pleading statutes, that if the exception is in the form of a proviso, it may be set up as defence, *State v. Abbott*, 31 N. H. 434; but where it is incorporated into the body of the clause, it must be expressly negatived by the pleader. *Commonwealth v. Hart*, 11 Cush. 130, 134.

BANKRUPTCY — PREFERENCES — PROVABLE CLAIMS. — A had two separate and distinct claims against a bankrupt, and on one of them he had received a preference. *Held*, that he cannot prove the other against the bankrupt's estate until he surrenders the preference. *In re Rogers' Milling Co.*, 102 Fed. Rep. 687 (Dist. Ct., Ark.).

The Bankruptcy Act of 1898, § 57 g, provides that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." Clearly, this clause applies where a creditor, having actually although innocently, received a preference by the partial payment of a debt, seeks to

prove the remainder of the same claim. *Strobel & Wilkin Co. v. Knost*, 99 Fed. Rep. 409; *In re Ft. Wayne Electric Corp.*, 99 Fed. Rep. 400. The principal case applies the provision to any claim, though separate and distinct from the one preferred. The result reached by this construction is just and equitable, for the object of the act is to secure an equal distribution of the bankrupt's estate among all the creditors in proportion to their respective claims. If, therefore, the preferred creditor asks the aid of the court to give him a further share of the estate, he must be content to place himself upon an equality with the other creditors. That can only be done by a surrender of whatever preferences he has received. The same construction was adopted in a previous case under very similar facts. *In re Coultrain*, 97 Fed. Rep. 923.

BILLS AND NOTES — GUARANTY — RIGHTS OF INDORSEE. — The defendants signed, on the back of a promissory note to which they were strangers, the following agreement: "We hereby guarantee the payment of within note." *Held*, that a subsequent indorsee of the note cannot sue in his own name on the guaranty. *Edgerly v. Lawson*, 57 N. E. Rep. 1020 (Mass.).

It has been held by considerable authority that such a guaranty, written on a negotiable instrument, is itself negotiable. *Hopson v. Spring Co.*, 50 Conn. 597; *Ellsworth v. Harmon*, 101 Ill. 274. Similarly, if a mortgage is given as security with a note, the mortgage passes as an incident to the note. *Carpenter v. Logan*, 16 Wall. 271. This case, however, is distinguishable, because otherwise the mortgage is valueless, while in the principal case the indorsee of the note can of course sue on the guaranty in the name of his assignor. As a new proposition, there is much to be said for the position that such a guarantor, having agreed with reference to the payee "or order," should be held to the terms of his agreement. As the law stands, however, the negotiability of bills and notes themselves is an exception based on commercial necessity, and it seems that there is no present necessity for the extension of the exception to such guaranties. The principal case, moreover, is in accord with the great weight of authority. *True v. Fuller*, 21 Pick. 140; *Tinker v. McCauley*, 3 Mich. 188.

CONSTITUTIONAL LAW — COMMERCE CLAUSE — FISH AND GAME LAW. — *Held*, that a statute prohibiting all sales of game within the state is a regulation of interstate commerce and therefore void. *In re Davenport*, 102 Fed. Rep. 540 (Cir. Ct., Wash.).

Held, that a statute prohibiting the possession of certain game or fish during the close season is to be construed as not intended to cover the case of fish or game imported from another state, and is therefore valid. *People v. The Buffalo Fish Co.*, 164 N. Y. 93. See NOTES.

CONTRACTS — CONTRACT FOR SERVICES — WRONGFUL DISCHARGE. — The plaintiff, employed by defendant company for one year at a weekly salary, was wrongfully discharged. Two weeks later, he brought an action for his salary for the two weeks, and recovered. At the expiration of the year, he sued for salary accruing since the previous action. *Held*, that the former action is no bar, as the plaintiff's willingness to serve was equivalent to actual service, and he might have brought a separate suit for each week after his discharge. *Allen v. Colliery Engineers' Co.*, 46 Atl. Rep. 899 (Pa.). See NOTES.

CORPORATIONS — CITY ORDINANCE — ENCOURAGING MONOPOLY. — A city ordinance provided that all contracts for city printing should be awarded to union printers. The charter did not require that contracts be let to the lowest bidders. *Held*, that the ordinance is void as encouraging monopoly, and that a tax-payer is entitled to an injunction against its enforcement. *Atlanta v. Stein*, 36 S. E. Rep. 932 (Ga.).

There seems to be little or no authority on exactly the point here involved, but the case most nearly parallel reaches the same result. *Adams v. Brennan*, 177 Ill. 194. It is well settled that where a matter is left to the discretion of the municipal authorities, the court will not interfere with their action unless their discretion is manifestly abused. *Cleveland, etc. Co. v. Board of Fire Com.*, 55 Barb. 288. But it is justly argued in the principal case that the ordinance in question effectually prevented the free exercise of discretion which is the duty of municipal authorities, and by restricting competition tended directly to raise the price which the tax-payers must pay for the city printing. From this the conclusion is drawn that the city council had no authority to pass an ordinance so injurious to the public interest. The decision is therefore only an extension of the familiar principle which allows a tax-payer to stop

by injunction an unwarrantable expenditure of the public funds. *Avery v. Job*, 25 Ore. 512. Altogether, the principal case establishes a desirable precedent.

CORPORATIONS — MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS. — *Held*, that a municipal corporation is liable for injuries caused by the negligence of its agents. *Rhobidas v. Concord*, 47 Atl. Rep. 82 (N. H.). See NOTES.

CRIMINAL LAW — POSSESSION OF STOLEN GOODS — PRESUMPTIONS. — On an information for burglary, the trial court charged that the possession of stolen property immediately after the theft is sufficient to warrant a conviction for larceny, unless the other evidence so far overcomes the presumption thus raised as to create a reasonable doubt of the person's guilt. *Held*, that the charge is erroneous, since the effect of such evidence is solely for the jury. *Williams v. State*, 83 N. W. Rep. 681 (Neb.).

In early times a person found with stolen goods immediately after the theft was liable to summary punishment without the benefit of an ordinary trial. THAYER, PRELIM. TREAT. EV. 328. More recently such possession was considered a presumption of guilt, — conclusive unless satisfactorily explained. 2 EAST, P. C., c. 16, § 93. At the present day the weight of authority is in accord with the principal case in holding that the question as to what weight shall be attached to the fact of recent possession is solely for the jury. This fact is sufficient to justify an inference of guilt, but is not enough to create a legal presumption against the accused. *State v. Hodge*, 50 N. H. 510. In some states, however, it is still held to create a presumption of guilt, calling for explanation. *Smith v. People*, 103 Ill. 82. While the modern rule must be acknowledged to be judicial legislation, it is clearly a justifiable change; for the evidential value of recent possession can more properly be determined by the jury than by a fixed rule of law.

EQUITY — ADJOINING LANDOWNERS — LIABILITY FOR ENCROACHMENT. — The upper part of a wall of the defendant's building overhung the roof of a building on the plaintiff's land by a few inches. The encroachment was high in the air, and the cost of removing the wall would be very large without conferring upon the plaintiff any corresponding benefit. *Held*, that the defendant is liable for all damages which he may have caused, and that he will be enjoined from continuing the encroachment whenever the plaintiff shall desire to build. *Crocker v. Manhattan Life Ins. Co.*, 31 N. Y. Misc. 687 (Sup. Ct., Spec. Term).

Courts of equity are much more reluctant to compel a man to undo a tort than to compel him to perform a duty. Nevertheless, in strong cases of continuing trespass, accompanied by substantial damages and in no way offset by benefits, an injunction will be granted. *Garvey v. Long Island R. R. Co.*, 159 N. Y. 323. Yet the injunction should not issue where it would cause a greater injury than it is intended to remedy. *McSorley v. Gomprecht*, 30 Abb. N. Cas. 412. One practical reason for this result is the fact that the decree if granted would in most cases probably never be carried out, but would be used to extort an unreasonable amount from the defendant for the property taken. Equity will, however, in such cases give damages in order to settle the whole question in one suit. *McSorley v. Gomprecht*, *supra*. Still the decree in the principal case is clearly erroneous. If the injury to plaintiff is sufficiently serious to justify an injunction when he wishes to build, the decree should give it at once. Otherwise the relief should be confined to damages.

EQUITY — EXECUTION SALE — PURCHASE BY ATTACHING CREDITOR. — An attaching creditor bid in the property levied on at the execution sale. *Held*, that he is not a purchaser for value without notice. *Murphy v. Plankinton Bank*, 83 N. W. Rep. 725 (S. D.).

The court throughout the case speaks of the party under whom the plaintiff claims as an attaching creditor. It is true, if his only claim had been by virtue of an attachment, the case would be clearly correct, since, according to all the authorities, an attaching creditor is not a purchaser for value. *Whitworth v. Gangain*, 3 Hare, 416. But it seems to have been entirely overlooked that in the present case an execution sale had actually taken place in pursuance of the attachment, and that a sheriff's deed had been issued. Under these circumstances, it cannot be questioned that a *bona fide* purchaser is not affected by unrecorded rights existing against the judgment debtor. *Milner v. Hyland*, 77 Ind. 458. It is equally clear, moreover, that a judgment creditor thus buying at the execution sale should be in no worse position than a third person. *Riley v. Martinelli*, 97 Cal. 575. *Contra*, *Orme v. Roberts*, 33 Tex.

768 (*semble*). He has in good faith acquired a good legal title for which he paid value, and there is no equitable ground for disturbing his position.

EQUITY — INJUNCTION — CRIMINAL PROCEEDINGS. — Plaintiff asked an injunction to restrain the enforcement against him of a penal municipal ordinance, on the ground that the ordinance was unconstitutional. *Held*, that courts of equity will not enjoin criminal proceedings. *Bainbridge v. Reynolds*, 36 S. E. Rep. 935 (Ga.). See NOTES.

EQUITY — PROPERTY — EQUITABLE EASEMENTS. — *Held*, that an agreement in a deed that the grantor would keep a water-wheel in repair and furnish power for the benefit of the land granted makes an equitable easement binding on the grantor's vendee who takes with notice. *Gould v. Partridge*, 52 N. Y. App. Div. 40.

In at least one case the English courts enforced a burden imposed on certain land for the benefit of other land where it required the owner of the quasi-servient estate to do an affirmative act. *Cooke v. Chilcott*, 3 Ch. D. 694. Later decisions, however, enforce only restrictive burdens. *Austerbury v. Oldham Corporation*, 29 Ch. D. 750; *Haywood v. New Brunswick Bldg. Assoc.*, 8 Q. B. D. 403. In this country there is a tendency to adopt the broader rule of the earlier English case. *Whittenton Mfg. Co. v. Staples*, 164 Mass. 319, 327 (*semble*). It is always held that equitable easements will be enforced only where there is notice. *Tulk v. Moxhay*, 2 Ph. Ch. 774; *Tatimadge v. East River Bank*, 26 N. Y. 105. Hence the true basis of the doctrine seems to be the familiar equitable principle that a purchaser acquires property subject to those equities of which he has notice. In this view the grounds for equitable enforcement are the same whether the burden is affirmative or merely restrictive. The principal case is therefore correct. Nevertheless, the restrictive English rule may be followed in some jurisdictions upon the ground that it is contrary to public policy to burden successive owners with the performance of positive acts that are beneficial only to others.

EQUITY — PROPERTY — FRAUDULENT CONVEYANCE. — A debtor, in order to defraud his creditors, conveyed land to his mother, who paid a fair value and had no knowledge of the fraud. The conveyance was unsolicited by the mother. *Held*, that the creditors have a right to redeem the property by repaying the consideration. *Rummonth v. White*, 47 Atl. Rep. 1 (N. J., Ch.).

The general rule is that creditors cannot attack a fraudulent conveyance, as against a purchase for value without notice. *Anderson v. Roberts*, 18 Johns. 515; *Comey v. Pickering*, 63 N. H. 126. The court in the principal case, however, takes the ground that, where the conveyance is not a business transaction, the grantee is only entitled to be made whole. This appears to be analogous to the New Jersey rule, that a purchaser for value without notice of a note obtained by fraud can only recover what he paid for the note. *Holcomb v. Wyckoff*, 35 N. J. Law, 35. *Contra*, *Lay v. Wissman*, 36 Iowa, 305. There seems to be no sound reason for these exceptions to the fundamental rule, that a purchaser for value without notice takes free from equities. Such a purchaser from a fraudulent grantor must bear the loss, if the value of the property falls below the price he paid, and it is unfair to deprive him of a rise in value. The distinction made by the principal case is therefore inexpedient, and unsupported by authority in other states.

INSURANCE — BREACH OF CONDITION — DIVISIBLE CONTRACT. — Plaintiff insured his store and stock of goods for separate amounts, the premium being a gross sum on both. A clause of the policy provided that if an inventory should not be taken at a certain time, "this policy shall be null and void from that date." *Held*, that as the contract was indivisible, a breach of the stipulation voided the insurance on the building as well as on the stock of goods. *Southern Fire Ins. Co. v. Knight*, 36 S. E. Rep. 821 (Ga.).

Many courts conclude, with the principal case, that the payment of premiums in a gross sum and the use of the words "this policy" show an intention to make the contract indivisible. *McQueen v. Phoenix Ins. Co.*, 52 Ark. 257. But an almost equal number take the opposite view. *Coleman v. Ins. Co.*, 49 Ohio St. 310. In view of this direct conflict it seems proper to consider the purpose with which the words are used. Such stipulations are inserted because a greater risk is incurred without them. Hence it may well be held that a breach of the condition should prevent recovery on such of the insured items as are thereby made an increased risk. This construction

has been advantageously followed in at least one state, and seems to present a logical rule that can be applied to the varying circumstances of each case. *Phoenix Ins. Co. v. Pickel*, 119 Ind. 155; *Geiss v. Franklin Ins. Co.*, 123 Ind. 172. In the present case an increased risk on the stock would obviously be an increased risk on the building, and consequently the breach should avoid the policy *in toto*. *Pickel v. Phoenix Ins. Co.*, 119 Ind. 291.

INTERNATIONAL LAW — PRIZE — PLEDGE OF BILL OF LADING. — A Spanish subject shipped goods in a Spanish vessel and pledged the bills of lading to an English firm before war was declared between the United States and Spain. After the declaration of war the ship was captured by the United States. *Held*, that the pledge of the bill of lading does not make the goods neutral property so as to protect them from capture and sale as the property of the enemy. *The Carlos F. Roses*, 20 Sup. Ct. Rep. 803.

The status of enemy property, the bills of lading of which have been pledged to a neutral, seems never before to have arisen in a prize court. A neutral lien upon such property does not exempt the goods from capture. *The Tobago*, 6 Rob. 194; *The Battle*, 6 Wall. 498. The same is true of a mortgage. *The Hampton*, 5 Wall. 372. But it is recognized that a *bona fide* sale to a neutral does protect the property. *The Ariel*, 11 Moore P. C. 119. The principle upon which these cases rest seems to be that a prize court will not recognize a transfer as making the property neutral, if the loss resulting from condemnation will fall upon the enemy. *The Francis*, 1 Gall. 445, at 447. Loss will fall upon the enemy whenever the transfer is short of an absolute and *bona fide* sale, divesting all enemy interest. Since, therefore, a pledge, like a mortgage, is not such a sale, the principal case is undoubtedly correct.

INTERPRETATION OF STATUTES — DEATH BY WRONGFUL ACT — PERSON ENTITLED TO RECOVER. — A Georgia statute gave a remedy in cases of death by wrongful act to persons who were dependent upon the deceased or to whose support he contributed. Under this statute, a father who was earning enough to pay his own expenses, but who depended on his minor son by a former marriage to help support his second wife and children, sued for the son's death. *Held*, that he is not entitled to recover. *Georgia R. R. & Banking Co. v. Spinks*, 36 S. E. Rep. 855 (Ga.).

It is held in some jurisdictions that such statute should be construed liberally. *Haggarty v. Central R. R. Co.*, 31 N. J. Law, 349. This seems the better view, since they appear to be in the highest sense remedial, and on this ground the principal case is clearly wrong. The Georgia courts, however, have taken the position that they are harsh and punitive in nature, and so are to be construed strictly. *Smith v. Hatcher*, 102 Ga. 160. Nevertheless, the same courts have held that a mother can recover for the death of a son, when the father, mother, and children are mutually dependent. *Augusta Ry. Co. v. Glover*, 92 Ga. 132; *Daniels v. Savannah, etc. Ry. Co.*, 86 Ga. 236. The position of a father who is dependent on his son for a substantial part of his family expenses can hardly be differentiated from the facts in these cases. It is, therefore, difficult to support the principal case even accepting the narrow attitude of the court toward the statute.

PROPERTY — COVENANT FOR PARTY WALLS — SUIT BY VENDEE. — The plaintiff's vendor and defendant bought adjoining lots from a building estate at different times, each covenanting that, if use should be made by him of a party wall built by the owner of the adjoining estate, he would contribute one half of its value. *Held*, that the plaintiff is entitled to recover this amount upon user of such a wall by the defendant. *Irving v. Turnbull*, [1900] 2 Q. B. 129. See NOTES.

PROPERTY — EJECTMENT — DISSEISIN REQUISITE TO MAINTAIN ACTION. — The defendant street railway company without legal authority laid its tracks on a turnpike which crossed land which the plaintiff owned in fee. *Held*, that as the injury is not an injury to the plaintiff's possession, but an illegal user of the admitted easement of public travel, ejectment will not lie. *Becker v. Lebanon, etc. Ry. Co.*, 46 Atl. Rep. 1096 (Pa.). See NOTES.

PROPERTY — FRAUDULENT CONVEYANCES — EFFECT OF SETTING ASIDE. — A chattel mortgage on corporate property was made expressly subject to a prior chattel mortgage. This prior mortgage having been avoided by creditors as misappropriation of corporate property, *held*, that they have priority over the holder of the subsequent

mortgage to the amount covered by it. *Singer Piano Co. v. Barnard*, 83 N. W. Rep. 725 (Iowa).

If the effect of the creditors' action in avoiding the prior mortgage was to make the prior mortgagee a trustee for them, the decision would be clearly correct. But the better view is that the mortgage, when set aside, is to be regarded as no mortgage at all, and the property conveyed as having remained the property of the mortgagor. *Bethel v. Stanhope*, Cro. Eliz. 810; MAY, FRAUD. CONVEY., 58. It follows that, although the subsequent mortgagee could not himself have questioned the validity of the prior mortgage, yet when the creditors have avoided it, they should not be allowed thereafter to set it up against him. *Hibbard v. Cribb*, 80 Wis. 398 (*semble*). *Contra*, *Fox v. Willis*, 1 Mich. 321. Similarly, it is held that a wife joining with her husband in a fraudulent conveyance retains her dower, if the husband's creditors set the deed aside. *Robinson v. Bates*, 3 Met. 40. *Contra*, *Den v. Johnson*, 18 N. J. Law, 87 (*semble*). The principal case, therefore, seems wrong, though there is little authority on the precise point.

PROPERTY — GENERAL POWER — RIGHTS OF CREDITORS. — The donee of a general power of appointment exercised it by will. *Held*, that the appointed property cannot be reached by his creditors. *Humphrey v. Campbell*, 37 S. E. Rep. 26 (S. C.).

The present case is opposed to the authorities generally. *Townshend v. Windham*, 2 Ves. Sen. 1; *Clapp v. Ingraham*, 126 Mass. 200. These decisions rest on the principle that the donee of a general power is virtually *dominus* of the property, and that consequently an appointment by him to a volunteer, being equivalent to a conveyance of property, is, in case of insolvency, void as against his creditors. If not exercised, the power itself is not property which the creditors can reach. *Jones v. Clifton*, 101 U. S. 225. The court in the principal case relies on several earlier South Carolina cases. *Aaron v. Beck*, 9 Rich. Eq. 411; *Wilson v. Gaines*, 9 Rich. Eq. 420. These, however, decide merely that a woman who is given a life estate with a general power does not take an absolute interest which would on marriage vest in her husband. They do not, therefore, support the principal case, and it is to be regretted that the court did not come into line with the established doctrine.

PROPERTY — LATERAL SUPPORT — LIABILITY OF LESSEE. — *Held*, that neither the devisee of land nor his lessee is liable for damage to adjacent land through subsidence caused by excavations of the devisor, though occurring during the term of the lease. *Hall v. Duke of Norfolk*, [1900] 2 Ch. 493.

It was formerly considered that there was a right to the support of land analogous to an easement, for the violation of which an action would lie without actual damage. *Nicklin v. Williams*, 10 Ex. 259. This, however, has been overruled. *Backhouse v. Bonomi*, 9 H. L. Cas. 503. It is also decided that each successive subsidence gives rise to a new and distinct cause of action. *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127. These cases seem hard to explain except on the ground that the excavation and the failure to fill it in or substitute other support constitute a continuous tort analogous to a nuisance. Nevertheless, a lessee is not liable for a nuisance until he has been requested to abate it. *Penruddock's Case*, 5 Co. 101. Accordingly, accepting the analogy, it appears that the defendants in the principal case should be held liable only after notice of the defective support, and a request to remedy it. As no such facts appear, the decision is correct, but the language of the court is broad enough to cover cases where a request is shown, and this position seems untenable. The only other case which has been found on the point reaches the same result on similar facts. *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q. B. 165.

PROPERTY — PLEDGE — POSSESSION OF PLEDGEE. — An iron company borrowed money from A and agreed to pledge iron as security. The iron was placed on a particular spot of ground belonging to the iron company, which ground was tendered to A and accepted by him for his use. Later, without his knowledge or consent, the iron was removed and pledged to B, who had no notice of his claim. *Held*, that there is a sufficient possession in A to give him priority over B. *American Pig-Iron, etc. Co. v. German*, 28 So. Rep. 603 (Ala.).

To constitute a valid pledge, possession in the pledgee or his agent is indispensable. This is the distinguishing difference between a pledge and a mortgage. The pledgee's possession, moreover, must be exclusive of the pledgor's possession and control. *Casey v. Cavaroe*, 96 U. S. 467. It has been held, however, that there is a sufficient constructive delivery, though the goods remain on the premises of the pledgor, if they

are placed in the possession and control of one whose general relation to the pledgor is that of agent, but who in the particular transaction is the special agent of the pledgee. *Sumner v. Hamlet*, 12 Pick. 76. The principal case goes still farther, and would make the pledgor himself the agent of the pledgee. This is unjustifiable, for there must be an actual bailment, and the same person cannot be both bailor and bailee. At best the plaintiff had merely an equitable pledge, and his right must give way before the superior legal right of the subsequent innocent pledgee.

PROPERTY — REPLEVIN — POSSESSION. — A husband, as agent for his wife, loaded lumber belonging to her on the cars of a railroad. *Held*, that he could not maintain replevin for the goods, which were wrongfully removed by the railroad, since possession, in order to give a right of action, must be in one's own right, and not as agent. *Mitchell v. Georgia, etc. Ry. Co.*, 36 S. E. Rep. 971 (Ga.).

The court holds that the agent in possession is incapable of bringing the action, partly on the analogy of a case holding that a sheriff's deputy has not that power. *Ludden v. Leavitt*, 9 Mass. 104. That decision, however, rests upon a technical rule that the possession of a sheriff cannot be delegated, and that, therefore, the deputy has no possession. Moreover, it has been held on broader grounds in another jurisdiction that the deputy should be allowed to bring the action. *Poole v. Symonds*, 1 N. H. 289. This line of cases is, therefore, clearly insufficient to support the decision. The court also places its decision in part on the ground that a servant cannot sue in possessory actions. But even here, if the master has intrusted the servant with actual possession, as contrasted with mere custody, the latter should be treated as a bailee with the consequent right to sue. *Harris v. Smith*, 3 S. & R. 20. As the facts in the principal case clearly indicate a relation of agency coupled with such actual possession, the decision seems wrong.

SURETYSHIP — EVIDENCE — JUDGMENT AGAINST PRINCIPAL. — In an action against the sureties on an official bond, *held*, that a judgment against the officer is *prima facie* evidence against the sureties. *Barker v. Wheeler*, 83 N. W. Rep. 678 (Neb.).

This decision overrules earlier Nebraska cases in which such a judgment was held conclusive evidence. *Lewis v. Mills*, 47 Neb. 910. So far its correctness cannot be doubted, but it seems the court should have gone further, and held that the judgment was no evidence at all against the surety. On principle it is hard to perceive why the sureties should be affected by an action which they have no opportunity to defend. Clearly, they should be allowed to regard it as *res inter alios acta*. On the other hand, if this position is not adopted, it seems that the judgment should be conclusive against them. In any event, the middle ground here adopted cannot be supported on principle. BRANDT, SUR. § 630. It must be conceded, however, that perhaps the greater number of decisions are in accord with the principal case. *City of Lowell v. Parker*, 10 Met. 309; *Stephens v. Shafer*, 48 Wis. 54. Nevertheless, many well-reasoned American cases support the view here advocated, *Douglass v. Howland*, 24 Wend. 35; and such is the settled English doctrine. *Ex parte Young*, 17 Ch. 668.

TORTS — CORPORATIONS — LIABILITY FOR ULTRA VIRES ACT. — The defendant company was running cable cars under a charter authorizing them to use animal power only. One of these cable cars ran into and injured a car belonging to the plaintiff company. *Held*, that the defendant is not liable, in the absence of negligence. *Chicago General Ry. Co. v. Chicago City Ry. Co.*, 57 N. E. Rep. 822 (Ill.). See NOTES.

TORTS — DEATH BY WRONGFUL ACT — RELEASE BY PARTY INJURED. — The plaintiff's husband compromised an action against the defendant for a personal injury. The injury afterwards resulting in death, the widow sued under a statute allowing an action to be brought by the personal representatives of the deceased. *Held*, that the action is not maintainable. *Southern Bell Telephone Co. v. Cassin*, 36 S. E. Rep. 881 (Ga.). See NOTES.

TORTS — LIBEL — NEGLIGENT PUBLICATION. — The defendants circulated and sold books containing a libel on the plaintiff, although they did not know of the existence of the libel. The jury found that due care was not used in carrying on the business. *Held*, that these facts constitute a publication. *Vitzetelly v. Mundie's Select Library, Ltd.*, [1900] 2 Q. B. 170.

The gist of an action of libel is injury to the plaintiff's reputation. *ODGERS, LIBEL AND SLANDER*. This is clearly present in the principal case, so the decision is correct. The court, however, differentiates the case of librarians and news-venders from other cases of libel, and places the decision on a ground as yet not considered by the American courts. Clearly, the voluntary act of such a person must technically be considered a publication of the libel, irrespective of his knowledge or ignorance of the fact that he is so doing. It is, however, evident that it is impossible for a librarian to examine every book or paper disseminated by him, and hence it may well be held that the general welfare requires the recognition of an excuse in such cases. This has become the settled English law. *Emmons v. Pottle*, 16 Q. B. 354; *Martin v. Trustees of British Museum*, 10 Times L. R. 338. But the argument of public policy breaks down when, as in the principal case, the jury finds negligence on the part of the defendant. The decision is, therefore, in accord with the earlier cases.

TORTS — SLANDER — SUIT BY CORPORATION. — The defendant slandered the general manager and treasurer of the plaintiff corporation without directly referring to his connection with the corporation. *Held*, that the corporation could not maintain an action for an implied slander, nor recover for consequential injuries to its trade resulting from the defamation of its officer. *Brayton v. Cleveland Special Police Co.*, 57 N. E. Rep. 1085 (Ohio). See NOTES.

TRUSTS — CUSTODY OF RES — NEGOTIABLE SECURITIES. — The defendant trustees were authorized to keep a part of the testator's property in the form of railroad bonds payable to bearer. *Held*, that they may properly deposit such bonds with a bank in their joint names, with authority to the bank to remove the coupons and receive dividends. *In re De Pothonier*, [1900] 2 Ch. 529.

The rule is well settled that trustees need exercise only the care of prudent men of business in caring for the trust *res*. *Speight v. Gaunt*, 9 App. Cas. 1; *Taylor v. Hite*, 61 Mo. 142. But within this rule there is considerable latitude, and the present case is valuable in making the limits more definite. An earlier English case held it to be no breach of trust where a box containing the securities was deposited at a banker's, and one of the trustees kept the key for the purpose of removing coupons. *Mendes v. Guedalla*, 2 J. & H. 259. A strong *dictum*, however, in a more recent case seemed to indicate that the trustees must retain exclusive joint control. *Field v. Field*, [1894] 1 Ch. 430. This view is expressly negated in the principal case, and a far more liberal rule laid down. As the opinion points out, the trustees can hardly be expected to be present on each occasion to remove coupons. The method approved here certainly provides all reasonable security, and is more in keeping with ordinary business methods. The case will, therefore, probably be followed.

TRUSTS — EXECUTORS' SALE — PURCHASE BY WIFE. — Land was devised to an executor in trust to sell and apply the proceeds to various uses. At a properly conducted public sale, the wife of the executor bid in the property for an apparently adequate price, which she paid out of her separate estate. There was no evidence of actual fraud. *Held*, that the sale passes a sound and marketable title. *Miller v. Weinstein*, 52 N. Y. App. Div. 533.

Before the Married Women's Property Acts, the rule that a trustee or agent empowered to sell gives only a voidable title if he becomes directly or indirectly interested in the purchase was applied without question to a purchase by the wife of the fiduciary, even for her separate estate. *Davoue v. Fanning*, 2 Johns. Ch. 252. But in the principal case the court argues that since the wife may now contract without the consent of her husband and he has no right or interest in her real estate, there is no longer any reason for attacking a *bona fide* purchase on her part. The true reason for the limitation on the power of the trustee, however, seems to be that the law will not allow him to be placed in a position where he is tempted to sacrifice the interests of the beneficiary. A purchase by the wife is objectionable, simply because the relations between husband and wife are so close that her interest is ordinarily as strong a temptation to the trustee as his own. The rule is therefore not affected by the change in her legal status. The weight of authority supports this view in opposition to the principal case. *Bassett v. Shoemaker*, 46 N. J. Eq. 538; *Tyler v. Sanborn*, 128 Ill. 136.

TRUSTS — INDEBITATUS ASSUMPSIT — PRIVITY. — X contracted to convey certain land to plaintiff, subject to a mortgage, which was afterward foreclosed before conveyance to plaintiff. The proceeds of the foreclosure sale exceeded the mortgage

debt, and the surplus remained in the hands of the mortgagee's attorney. *Held*, that since the plaintiff was equitably entitled to the payment of the surplus proceeds he could recover them from the attorney in an action for money had and received. *Rush-ton v. Davis*, 28 So. Rep. 476 (Ala.).

To the general rule that a right equitable in its nature cannot be enforced by an action at law, there are two established exceptions. Where the old action of account would have lain to enforce what was substantially a trust, or where a wrongdoer becomes a constructive trustee for the person injured, *assumpsit* for money had and received is allowed. *Hancock v. Franklin Co.*, 114 Mass. 155; *Staat v. Evans*, 35 Ill. 455. These cases are rather anomalous, but in all there is a clear duty, though an equitable one, owing directly from the defendant to the plaintiff, on which to found the implied promise which is the basis of *indebitatus assumpsit*. In the principal case there is no such duty, since defendant's obligation was not to X, but to the mortgagee alone, and the total lack of privity should have been fatal to the action. *Robbins v. Fennell*, 11 Q. B. 248. In several American cases, however, where the depositor of a note for collection sued the sub-agent bank on the failure of the bank of deposit, the necessity of privity has been denied or ignored. *Metropolis Bank v. First Bank* 19 Fed. Rep. 301.

REVIEWS.

THE RIGHTS, DUTIES, REMEDIES, AND INCIDENTS BELONGING TO AND GROWING OUT OF THE RELATION OF LANDLORD AND TENANT. In two volumes; with forms. By David McAdam, one of the Justices of the Supreme Court of the State of New York. Third edition. New York: Remick, Schilling & Co. 1900. pp. xiii, 856; x, 857-1768.

It is a long step from the first edition of Judge McAdam's *Landlord and Tenant*, which appeared in 1876 and consisted of four hundred pages, to the two compendious volumes now before us. The general scope and plan of the work is still much the same, nevertheless, as in the two prior editions. The present edition, however, is far more valuable than its predecessors, for not only does it bring down to date a branch of the law which is constantly being modified by statutory changes, but it also presents a much fuller discussion of the subjects treated and a broader field of quotations and references. The text of the book has in many places been entirely rewritten, and everywhere considerably expanded. The author considers his subject of landlord and tenant with great thoroughness and from various points of view. A discussion of the topics, among others, of tenure in general, leases, their validity, termination, assignment, and renewal, covenants, forfeiture, fixtures, emblements, and the doctrine of agency make up the first volume. In the second volume the chief subjects considered are principal and surety, rights and remedies of the landlord, trespass, easements, excavations, party walls, nuisance, waste, repairs, surrender, eviction, rights and remedies of the tenant, remedies of legal representatives, and distress. A collection of forms of leases, covenants, etc., with an index and a table of cases, complete the volume. The statement of the law on any particular point is accurate and concise, and is fully illustrated by references to and quotations from decided cases. The book does not often go deeply into theoretical discussions, but only gives an adequate statement of what the law is. This method, although it may not always be of great help to the student, satisfies the need of the lawyer — and it is for the practitioner that the book

is written. The system of arrangement is clear, and an excellent index makes the work most available for ready reference. Although many of the cases chosen for illustration are taken from the New York reports, and a large part of the text is devoted to peculiarities of the law of that state, yet there are many citations from a broader field, and the book gives usually an excellent statement of the law in other jurisdictions. In some few instances, however, Judge McAdam has stated as the general law a rule peculiar to New York. A flagrant example of this error is to be found on page 83, when it is said that if a tenant holds over the extent of his term without the landlord's permission, the latter may, at his election, treat the tenant as a trespasser or hold him as tenant for a renewed term upon the conditions of the prior lease as far as applicable. This is in accord with the decisions in New York, but the general rule is that he is a tenant at sufferance, and only upon the payment of rent, or some similar form of acknowledgment, can he be called a tenant from year to year. Moreover, he is never a trespasser, for his original entry was lawful. Again, the statement is made that an oral disclaimer of his landlord's title by a tenant for years does not work a forfeiture. This is law in England and in New York, but the prevailing doctrine in this country is the other way. *Willison v. Watkins*, 3 Pet. 43. In proportion to the whole work, however, these are but minor faults. In general, as has been said, the book is accurate and clear. Judge McAdam's work will doubtless prove valuable to the profession, and particularly so to those who practice law in New York state.

E. S. T.

HISTORICAL JURISPRUDENCE. An Introduction to the Systematic Study of the Development of Law. By Guy Carleton Lee, Ph. D. New York: The Macmillan Company. 1900. pp. xv, 517.

This book is of equal interest to the lover of history and to the student of law. Tracing as it does the foundation and development of legal principles in those countries whose systems of law have been of lasting impression upon the jurisprudence of modern civilization, their social conditions and political history are of necessity considered, law being, as the author says, "an outgrowth of the needs of man in society;" while at the same time legal principles and institutions are examined with sufficient minuteness to give to the lawyer a technical knowledge of the substantive law of those systems from which our present ideas are largely an outgrowth.

The book is divided into three main parts. Part I., dealing with the foundations of law, takes up in succession the legal systems of Babylonia, Egypt, Phœnicia, Israel, India, and Greece. The sources and history of the law of each of these countries is discussed, whether developed from mere custom, or adopted from other nations, or made in the process of political growth; and certain branches of the law are traced with especial care. These are such subjects as contracts, sales, mortgages, domestic relations, property rights, and succession. The reader finds among these topics many familiar principles of the law of to-day. Part II. treats the development of jurisprudence, and deals especially with the growth of the principles of the great system of Roman law, which has so influenced all other systems since its day. This is traced from its beginnings down to the time of the code of Justinian. The origin and growth of the

Canon Law and the extent of its influence and jurisdiction throughout Europe are dwelt upon at some length ; and the law established in Roman territory by the barbarian invaders, perpetuating so much of the law of the conquered people, is discussed. The subject of Part III. is The Beginnings of Modern Jurisprudence. Under this heading are considered the renewed study of Roman law beginning with the revival of intellectual activity after the Dark Ages in the twelfth century, and the reception of Roman law in Italy, Germany, France, Spain, and Scotland. Lastly the author discusses the early English law, considering its history and the sources and development of its modern ideas. This subject is carried down to the time of Bracton, who was among the first lawyers to insist upon a reliance upon precedents, and thus practically established our present system of case law.

The book gives, on the whole, an excellent view of the origin and growth of legal principles and of the science of jurisprudence from the earliest appearance of legal thought down to the point where the average law student begins his study. In our desire to fit ourselves as soon as possible for active practice, we in America are very apt to neglect the historical side of the law, and are willing to begin where our modern principles and ideas began, without taking the time to investigate the foundation upon which those principles rest, and to compare our ideas with the ideas which have by gradual growth become established in other countries. A well-rounded lawyer will have some knowledge of the historical basis of his own law and of the jurisprudence of other countries, and this knowledge will be of value to him in understanding the principles he employs in practice. There are few books which will in so short a space furnish such an excellent general view of these subjects as does this work of Mr. Lee, and which will impress upon the student so thoroughly that the legal principles he investigates were not made on the spur of the moment, but are the result of a long process of development.

L. P. M.

ELEMENTS OF AMERICAN JURISPRUDENCE. By William C. Robinson, LL. D. Boston : Little, Brown & Co. 1900. pp. lviii, 401.

This is a companion volume and introduction to Mr. Robinson's excellent treatise on Elementary Law, and will prove of distinct value to all entering upon the study of law. The method is pursued that was found so satisfactory in the author's Elementary Law, — to each paragraph of text numerous authorities are appended where the student may find a more extended treatment of the subject. Mr. Robinson's discussion is sufficient to enable the student intelligently to approach these references.

The author very largely follows Holland in his discussion of the nature of law and in his classification of rights, but devotes more attention to the subject of "duties." An excellent chapter treats of the forms of law — the origin and growth of the unwritten and the written law. The nature and origin of courts is also discussed at length. A subsequent chapter deals with Fictions and Presumptions. As to the latter the author makes the seemingly unsound and certainly useless distinction between presumption of fact and of law. A section is also devoted to Conflicting Presumptions. However valid this latter class may be in continental systems of law, where "arithmetic is substituted for observation in estimating the value of evidence," it is entirely inapplicable to the common sense meth-

ods of the Common Law. In outlining his topic the author states that "American Jurisprudence is a special science treating of the laws of the United States." It would seem quite as proper to speak of the special science treating of the rocks of Mexico. There is no difference in kind that marks off the common law as applied in the United States from the common law as applied in England, Canada, or Australia. In truth, jurisprudence is the science that underlies all systems of law, and to speak of the particular jurisprudence of a certain country as writers often do, is a misapplication of a term with a well established and definite meaning, to express an idea equally well expressed by another term, viz., law, merely because the longer word is thought to sound better. This comment is further borne out by the author's treatment of his subject. The space devoted to the principles underlying the law is brief compared to that given up to the actual law administered. It is well for the author's avowed purpose that this is so, for one could scarcely regard an extended study of jurisprudence, using the term in its proper sense, as preparatory to a study of elementary law.

F. R. T.

DER GESETZLICHE SCHUTZ DER BAUGLÄUBIGER IN DEN VEREINIGTEN STAATEN VON NORD-AMERIKA. Ein Beitrag zu den Entwürfen eines Reichsgesetzes betreffend die Sicherung der Bauforderungen und eines Preussischen Ausführungsgesetzes. Von Dr. Georg Salomonsohn. Berlin: Carl Heymanns Verlag. 1900. pp. xv, 493.

This German work on the mechanics' lien laws of the United States cannot help but prove as valuable to German readers as it is interesting and instructive from the American standpoint. Its object is to present an outline of American legislation and its effect on economic conditions, so as to enable Germany in the solution of its problems to profit by our experience. To show that this is possible on account of the similarity of conditions in the two countries, the author discusses in the first part of the book the economic relations and the legal rights in America, irrespective of statutory protection, of those persons contributing to the improvement of real estate. He then in the second part gives a comprehensive view of American legislation as interpreted by decided cases, followed by a translation and explanation of the lien laws of the State of New York. Part III. is taken up in showing the effect of the lien laws on the building industry of the United States and in summing up the principles brought out in the development of American law, which the author thinks should be applied in German legislation.

The systematic exposition of the American law is naturally the most interesting portion of the work from our point of view. It covers the subject completely, and shows a careful study by the author of the details of our system. The notes contain numerous citations of cases and statutes, while incorporated into the text we find many quotations from American cases, well selected and ably translated. The discussion of the rights of sub-contractors is especially good. The distinction between the Pennsylvania system giving the sub-contractor a direct lien and the New York system working out his rights by subrogation to the contractor's lien is clearly brought out, though more space might perhaps have been devoted to the discussion of the comparative merits of the two systems. Moreover, the author points out a distinction, which is not gener-

ally noticed, between two methods of protecting laborers and materialmen, one by preventing the misappropriation by the contractor of the funds which should reach them, the other by giving them a lien on the real estate so far as such funds have not been provided or have been misapplied. As a whole, the work shows an appreciation on the part of the author of the spirit of American institutions.

H. K.

ESTOPPEL BY MISREPRESENTATION. By John Skirving Ewart. Chicago: Callaghan & Co. 1900. pp. xlvii, 548.

There is hardly a topic in the law so uncertain in regard to its scope and fundamental principles as that of estoppel by misrepresentation. Mr. Ewart has made a commendable attempt at a thorough treatment of the subject; and at the outset gives us a novel and useful contribution, in his use of the terms "estoppel-asserter" and "estoppel-denier," to designate the actors in cases of estoppel. A detailed analysis of the necessary elements of estoppel in its different phases takes up the first half of the book. The author's conclusion, that moral guilt is in general immaterial in estoppel by misrepresentation, is most far-reaching; and, as he points out, is inconsistent in principle with the generally accepted doctrine of *Peck v. Derry*. The remaining half of the book is devoted to a discussion of estoppel, as applied to various branches of the law. Here it would seem that the author gives to estoppel far too great a scope. Instead of treating it as a doctrine to be resorted to only when the desired result can be attained on no other theory, he makes use of it in every possible case. The doctrines of prior equities, purchaser for value without notice, and the negotiability of bills and notes are among those that are explained as resting on estoppel by assisted misrepresentation.

The book will be the less useful to the practitioner, in that almost no American cases are considered in the text, and comparatively few are cited in the footnotes. Yet, although its style is at times scarcely dignified, especially where the English doctrine of tacking mortgages is said to make the legal title like a "greasy pig," the book does contain distinctly vigorous thought and discussion on a rarely discussed subject.

R. B. S.

THE POLICE POWER OF THE STATE AND DECISIONS THEREON AS ILLUSTRATING THE DEVELOPMENT AND VALUE OF CASE LAW. By Alfred Russell of the Detroit Bar. Chicago: Callaghan & Co. 1900. pp. xvii, 204.

As its title indicates, the purpose of this volume is not so much a complete exposition of the so-called police power as a plea for our system of case law. By an analysis of the application of the various constitutional restrictions to this unclassified legislative power, the writer is enabled to define with considerable clearness the limits of this power under the constitutions. By this development and statement of the law, he not only aids in clarifying an important growing subject, but performs a valuable service by insisting upon the superiority of the flexibility of case law over the rigidity of codified law. But in common with many others, he does not always perceive that in dealing with this power the question is often a more fundamental one than that of constitutional restrictions, namely that of the limits of legislative power in general aside from constitu-

tions: The question whether such limits have been surpassed is hardly one for the courts, though our author sometimes seems to consider it as such. Further, although he does not exaggerate the importance of the function of our courts in applying constitutional restrictions as a protection against the populist legislation so characteristic of our day, he forgets that the duty of the courts is simply to decide judicial questions by the application of strict rules of law, not to supervise the legislature in the exercise of its wide discretion within the Constitution. The assumption of such a right by the courts can only be fraught with danger. The only appeal from the abuse by the legislature of its discretionary power is to the people.

W. H. H.

REGISTERING TITLE TO LAND. By Jacques Dumas, LL. D. Chicago: Callaghan & Co. 1900. pp. 106.

This little volume comprises a series of five lectures delivered by the author in 1899-1900 at Yale. The general interest which the question of registration of title now has for the American public, in view of the adoption of the Torrens system of registration of title by several states, renders the publication of M. Dumas's luminous exposition of the subject doubly welcome. The author begins by distinguishing registration of deeds from registration of title. He then traces the history of registration of title in several countries that have adopted that method, — Australia, Austria, and Prussia. A chapter apiece is devoted to the English and French systems of registration, and their respective defects are pointed out. In the last chapter, after enumerating the other countries where registration of title prevails, the author concludes by summing up the advantages of the system owing to its simplicity and economy. As he justly remarks, the thing that prevents registration of title from being everywhere adopted is simply the opposition of the legal profession — owing, as he says, to a fear of its advantages much more than of its deficiencies. But conceding that registration of title has all the merits claimed for it by the author, some doubt has been expressed as to its compatibility with the "due process of law" clause of our Constitution. With this phase of the question M. Dumas does not deal. It was thought that the national Supreme Court would have to pass on this matter in a recent Massachusetts appeal, but it is now feared that the decision will go off on another point. This difficulty as to constitutionality once removed, everything would seem to point to a prevalence of similar legislation throughout the country.

F. R. T.

We have also received: —

A TREATISE UPON THE LAW AND PRACTICE OF TAXATION IN MISSOURI. By Frederick N. Judson. Columbia, Missouri: E. W. Stephens. 1900. pp. xiv, 358. A discussion of the principles of taxation with reference to one particular state does not limit the interest of the work to the boundaries of that state, for the problems of taxation are general ones and are met in very similar ways throughout the Union. This is particularly true of Mr. Judson's work, as he considers his subject broadly, and frequently makes reference to the tax laws of other states. The book is divided into three parts: the history of taxation in Missouri, present-day taxation in that state, and taxation of the future. The present system in Missouri

is discussed at length and its chief errors pointed out; especially the failure of the general property tax in securing uniformity of assessment, — it ranges 33 per cent. of the actual value in the country districts to 70 per cent. in the city of St. Louis, — and the worse than failure of the personal property tax, which by reason of the ease and frequency with which it is evaded puts a premium on dishonesty. In discussing taxation of the future the author lays great stress upon the taxation of franchises, and refers with approval to the recently adopted franchise tax law of New York. He hopes for a more equitable system of assessment of real estate, and the abolition of such inquisitorial taxes as those on personal property and personal incomes. His discussion of the subject is adequate, and his conclusions seem sound. The book should prove valuable to all who are interested in the subject.

HAND BOOK OF FIRE INSURANCE. By Frank R. Fairweather. With articles on the Duties of Agents and Sub-Agents and a Digest of the Fire Insurance Cases of the Maritime Provinces of Canada. By Reginald R. Fairweather, B. C. L. St. John: The Globe Publishing Co., Ltd. 1900. pp. v, 208. The authors in this book have given us a valuable addition to the various insurance publications. The work, while not exclusively a legal one, will be found of considerable worth by lawyers, as to every lawyer handling insurance business a practical knowledge of the methods and requirements of insurance companies and the nature of the risks assumed is essential. The authors have very satisfactorily treated this non-legal portion of the work, bringing out the salient points clearly yet concisely. The subject of the Duties of Agents and Sub-Agents is ably handled, and the chapters devoted to Parol Agreements and Forms of Policies are well worth perusal. But perhaps the chief value of the book to members of the legal profession is the admirable Digest of the Maritime Provinces Insurance Cases and Appeals to the Supreme Court of Canada. These cases are very fully digested and the points decided distinctly stated. The book, while of especial importance to Canadians, is not without interest in this country, as the Canadian courts are recognized as furnishing us with many of the most noteworthy cases on insurance law. The authors' style is good, the arrangement excellent, and the book is singularly readable.

OUTLINE STUDY OF LAW. By Isaac Franklin Russell. Third edition. New York: Baker, Voorhis & Co. 1900. pp. xix, 344. It is not surprising that the demand for Professor Russell's book should have justified a third edition, and this in spite of the fact that the work is open to some criticism. It is not strictly a text-book, but aims to give in brief compass an outline of the whole field of law. The scope is very broad, including even international law, constitutional interpretation, and questions of national polity. The necessity for extreme brevity makes it impossible to develop and qualify general principles, explain definitions, and indicate the application of broad rules to particular cases sufficiently to make the book of much value to either lawyers or students who wish to find out what the law is on particular points. And when due allowance has been made for the difficulty of adequate presentation in so narrow a space, some statements seem unnecessarily vague or even misleading. In spite of these objections, however, the layman or the beginner, desirous of knowing what the law is like, will find the book both helpful and

interesting ; and this is the purpose which the author seems to have had primarily in mind.

A BRIEF FOR THE TRIAL OF CIVIL ISSUES BEFORE A JURY. By Austin Abbott. Second and enlarged edition by the publishers' editorial staff. Rochester, N. Y. : The Lawyers' Coöperative Publishing Co. 1900. pp. xiii, 603. This volume the publishers have seen fit to call a second edition of Mr. Abbott's work. But the title is a misnomer, so extensive has been the enlargement. While the original text has been substantially retained, there is unfortunately nothing to indicate where the additions have been made. This is not only unfair to its learned author, but also cannot fail to lessen its value to the reader, as Mr. Abbott's work had special merit in that it was prepared from the actual trial briefs of a careful lawyer, an advantage wanting in the work of his editors. The number of cases cited has been greatly increased with a view to use in any jurisdiction. The total omission of important English cases, however, is to be regretted, for certainly they are still of value in modern American practice. A good general index is provided, but a list of the cases cited is dispensed with. On the whole, the book will no doubt find a place as a suggestive book of reference, although it is of no great worth as an authority.

THE LAW OF BILLS, NOTES, AND CHEQUES. By Melville M. Bigelow, Ph. D. Second edition. Boston : Little, Brown & Co. 1900. pp. xxxi, 349. In this edition of Mr. Bigelow's valuable work the text has been largely rewritten. The opening discussion of the Law Merchant has been much expanded, and several new chapters have been added throughout the work. Numerous recent authorities are cited, and much valuable new matter is furnished by voluminous footnotes. Corrections have here and there been made in the text — for instance, in his first edition Mr. Bigelow stated *Price v. Neal* to be overruled ; but in the present edition he acknowledges it to be generally law for the precise point decided. What greatly increases the value of the book to Americans is the substitution in the appendix of the New York Negotiable Instruments Law for the English Bills of Exchange Act, and the constant reference made to this statute throughout the text. Too much can hardly be said in favor of this edition. It furnishes us with a readable and yet concise treatment of an extremely technical subject.

THE LAW IN ITS RELATION TO PHYSICIANS. By Arthur N. Taylor. New York : D. Appleton & Co. 1900. pp. iv, 550. The object of this work is to place within the reach of every physician a systematic treatment of those questions of law which present themselves most frequently in his ordinary professional work. The author seems to have done his work with considerable thoroughness. The main principles are fully discussed and the proper rules clearly laid down. Both the approved doctrine and the peculiar constructions adopted in the various states are illustrated by cases. Leading decisions are treated at length, and the notes contain several hundred references to cases and statutes. The book is written in an interesting style, and is so clear in its treatment that it may be easily understood by non-legal readers. While it is principally of value as a handbook for the physician, to afford him reliable information as to his legal rights and liabilities, it will also prove useful to the lawyer who

desires to gain a general knowledge of the main principles of medical law.

HAND-BOOK OF THE LAW OF BILLS AND NOTES. By Charles P. Norton. Third edition. By Francis B. Tiffany. St. Paul: West Publishing Co. 1900. pp. x, 553. The first edition of this work was published in 1893, the second in 1895. The principal change to be noted in the present edition is the addition of an appendix containing the Negotiable Instruments Law. The text of the law as here printed is that of the New York act, and the modifications made by the various states in which the law has been adopted are pointed out in the notes. Throughout the book the editor has inserted references to the appropriate sections of the law, and has also indicated any changes effected by them. These new features add greatly to the practical value of the work. Standard cases to be found in certain case books in use in the law schools, wherever cited in the text or notes, have been indicated by being printed in bold type. A table of cases and an index complete the volume. This book should be useful equally to the student and to the practitioner.

MANUAL OF CRIMINAL LAW. By Emory Washburn, LL. D. Third edition, with Notes by Marshall D. Ewell, LL. D. Chicago: Callaghan & Co. 1900. pp. lv, 278. This work is intended as an introduction to the study of criminal law. The author first deals with a few of the primary principles of the subject, and then briefly considers almost all common law, and some statutory crimes. By far the greater portion of the book is devoted to criminal procedure. A criminal prosecution is traced from beginning to end. The different contingencies which may occur at each stage of the proceedings are treated in sufficient detail to be of considerable value. All through the volume numerous cases are cited and textbooks are quoted so freely that at times one feels as if he were reading little more than a series of selections. Nevertheless the book is on the whole decidedly readable. From a Massachusetts standpoint it derives additional value from the extensive use of the decisions and statutes of that state to illustrate the text.

SOCIAL JUSTICE. A Critical Essay. By Westel W. Willoughby, Ph. D. London and New York: The Macmillan Company. 1900. pp. ix, 385. The determination and application of the ethical principles underlying our social institutions is the object of this essay. The author first analyzes the idea of justice as an abstract principle, and then applies what he determines to be the true conception to the concrete and fundamental economic problems. This involves a critical examination of various economic theories, especially those for the justification of private property. These criticisms and the conclusions drawn from them give the book its chief value. The scholarly and yet practical way in which the author has approached the whole problem before him will make the volume most stimulating to the student of social problems. To the legal profession, the chapter dealing with the theories of Punitive Justice will be especially interesting.

OWEN'S LAW QUIZZER. By Wilber A. Owen, LL. M. Second edition. St. Paul: West Publishing Co. 1900. pp. v, 613. The most striking feature of the second edition of this work is its scope, some twenty-five

subjects being treated. The book will doubtless be of value for the purposes of a hasty review, but only to those who are already well grounded. In many cases the authorities cited to sustain the answers are not wisely chosen, and to this may be traced most of the inaccuracies which appear in the text. While questions presenting concrete cases would be of more value to the student who uses the case system, yet the method adopted of asking a general question and answering it by a definition, will doubtless be found useful by many who cling to the older manner of studying law.

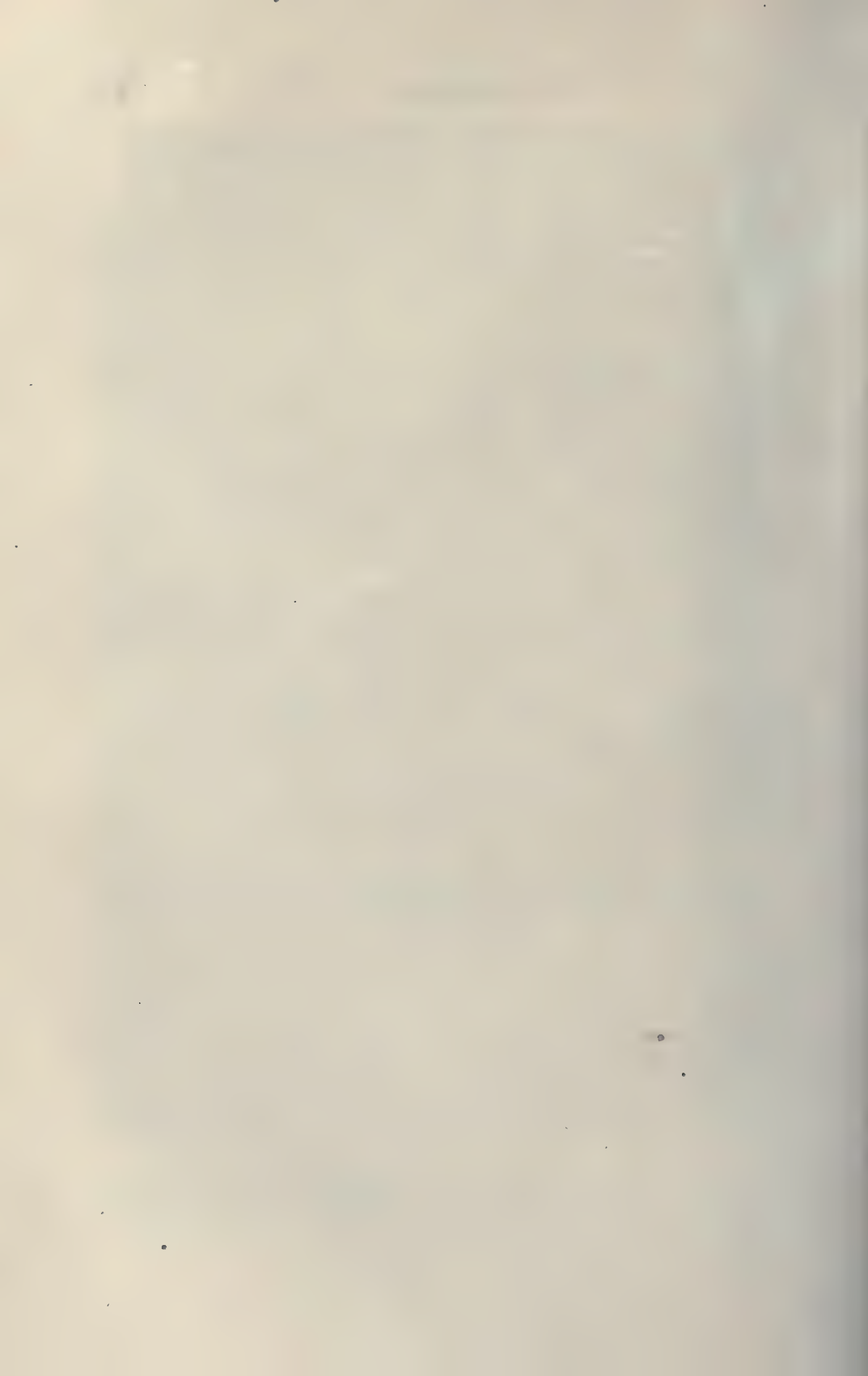
A SELECTION OF CASES ON THE LAW OF INSURANCE. By Edwin H. Woodruff. New York: Baker, Voorhis & Co. 1900. pp. xiii, 592. The author in this volume has furnished us with an excellent case book. By omitting portions of the original reports of most of the cases printed, he has been able, without unduly increasing the size of the volume, to touch upon more questions in the law than is usual in a similar work. Nevertheless, this condensation has not been carried so far as in any way to impair the value of the book. The difficult task of selecting the cases has been performed with discrimination, and the general arrangement is on the whole satisfactory. An excellent index greatly adds to the convenience of the work.

REPORT OF THE TWELFTH ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION, held at Hotel Chamberlain, Fort Monroe, Va., June 17th, 18th, and 19th, 1900. Edited by Eugene C. Massie, Secretary. Richmond: John T. West. 1900. pp. 389.

THE PEACE CONFERENCE AT THE HAGUE. And its Bearings on International Law and Policy. By Frederick W. Halls, D. C. L. New York: The Macmillan Co. 1900. pp. xxiv, 572. *Review will follow.*

AMERICAN LAW. A Treatise on the Jurisprudence, Constitution, and Laws of the United States. By James De Witt Andrews. Chicago: Callaghan & Co. 1900. pp. lxii, 1245. *Review will follow.*

THE PUBLICATIONS OF THE SELDEN SOCIETY. BEVERLEY TOWN DOCUMENTS. Edited for The Selden Society by Arthur F. Leach. London: Bernard Quaritch. 1900. pp. lxii, 164. *Review will follow.*



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REPUDIATION OF CONTRACTS.

THE use of the word "repudiation" in the law of contracts is modern, and though the conduct to which this name has been applied can hardly have been confined to modern times, still it is chiefly in recent cases that the legal effect of such conduct has been considered. Indeed, it cannot be said that the courts have even as yet worked out a consistent and logical doctrine on the subject.

By repudiation of a contract is to be understood such words or actions by a contracting party as indicate that he is not going to perform his contract in the future. He may already have performed in part; part performance may already have become due from him under the contract, but not have been rendered; or the time when any performance is due from him may still be in the future. The essential element which exists in all these cases is something still to be performed in the future under the contract which, as he has made manifest, he is not going to perform. Whether the reason he discloses for his prospective failure to perform is because he cannot or because he will not seems wholly immaterial, though the word "repudiation" is more strictly appropriate to cases where an intention not to perform is manifested, irrespective of ability.

In case such repudiation of a contract is made by one contracting party, the other may frequently, at least, take one of two courses.

I.

He may elect to rescind the contract entirely. This right generally exists where there has been repudiation or a material breach of the contract, and is most commonly exercised when the aggrieved party has performed fully or in part, and wishes to recover what he has given or its value. Thus he has a right to restitution as an alternative remedy instead of compensation in damages. This choice of remedies was not allowed by the early English law,¹ and there are still many exceptions and inconsistencies in the application of the rule, which are due in part to the fact that the rule has been developed largely under cover of the fictitious declaration in *indebitatus assumpsit*, and of equally fictitious inferences that a refusal to perform a contract indicates assent to the rescission of the contract and the restoration of what has been given under it. As may be observed in other branches of the law, the English cases are more conservative than the American — less ready to accept a new general rule varying from early precedents. So that the principle stated above must be taken only with very considerable qualifications as a statement of the law of England. Indeed, that principle is directly at variance with statements of law made in recent English cases — statements which would doubtless in many classes of cases be acted on.² In this country, though there are exceptions to the rule, it may safely be laid down as a general principle. The following paragraphs show its applications and limitations.

If a party to a contract has paid money and the other party has wholly failed to perform on his part, restitution may be had both in England³ and in this country.⁴

¹ The earliest cases allowing an action for restitution against a defendant guilty of breach of contract, and who might have been sued on the contract for damages, are *Dutch v. Warren*, 1 Str. 406, and *Anonymous*, 1 Str. 407, decided in 1721; but in the first of these decisions, though the action was in form for restitution, the plaintiff's damages were restricted to the value of what he ought to have received by the contract. No general recognition of a right to restitution as a remedy for breach of contract existed prior to decisions of Lord Mansfield and Lord Kenyon at the end of the eighteenth century.

² See *e. g.* *James v. Cotton*, 7 Bing. 266, 274, per Tindal, C. J.; *Street v. Blay*, 2 B. & Ad. 456, 462; *Dawson v. Collis*, 10 C. B. 523, 528.

³ *Towers v. Barrett*, 1 T. R. 133; *Giles v. Edwards*, 7 T. R. 181; *Farrer v. Nightingal*, 2 Esp. 639; *Widdle v. Lynam*, Peake, A. C. 30; *Greville v. Da Costa*, Peake, A. C. 113; *Squire v. Tod*, 1 Camp. 293; *Wilde v. Fort*, 4 Taunt. 334; *Bartlett v. Tuchin*, 6 Taunt. 259; *Gosbell v. Archer*, 4 N. & M. 485. So in the colonies, *Wrayton v. Naylor*, 24 S. C. Canada, 295; *Wolff v. Pickering*, 12 S. C. Cape of Good Hope, 429, 432.

⁴ *Nash v. Towne*, 5 Wall. 689; *Lyon v. Annable*, 4 Conn. 350; *Thresher v. Ston-*

If land has been conveyed instead of money paid, the special right given by the vendor's lien is the only right the English seller has, other than an action on the contract for damages.¹ But in this country the vendor may obtain restitution by a bill in equity.²

If the title to personal property has been transferred, whether under a contract of exchange³ or sale,⁴ the English law does not permit the transferrer to rescind the transaction and revest the title in himself because he has not received the promised payment. This is true even though the seller has retained possession of the property, and therefore has a vendor's lien.⁵ The right of stoppage *in transitu*, although it may seem equivalent in effect to a right of rescission in the limited class of cases where it is applicable, does no more than continue the vendor's lien after the property has passed from his possession.⁶ In this country, however, if the seller has not parted with possession of the goods, he is generally allowed, on default of the buyer to keep them as his own or make a resale — rights which seem necessarily to involve a rescission.⁷ But if the seller

ington Bank, 68 Conn. 201; *Barr v. Logan*, 5 Harr. (Del.) 52; *Payne v. Pomeroy*, 21 D. C. 243; *Trinkle v. Reeves*, 25 Ill. 214; *German, etc. Assoc. v. Droge*, 14 Ind. App. 691; *Wilhelm v. Fimple*, 31 Ia. 131; *Doherty v. Dolan*, 65 Me. 87; *Ballou v. Billings*, 136 Mass. 307; *Dakota, etc. Co. v. Price*, 22 Neb. 96; *Weaver v. Bentley*, 1 Caines, 47; *Cockcroft v. Muller*, 71 N. Y. 367; *Glenn v. Rossler*, 88 Hun, 74; *Wilkinson v. Ferree*, 24 Pa. 190.

¹ *Dart, Vendors & Purchasers* (6th ed.), 1248. It is common practice in England to insert an express stipulation allowing rescission. *Dart*, 178.

² *Savannah, etc. Ry. Co. v. Atkinson*, 94 Ga. 780; *Cooper v. Gum*, 152 Ill. 471; *McClelland v. McClelland*, 176 Ill. 83; *Patterson v. Patterson*, 81 Ia. 626; *Scott's Heirs v. Scott*, 3 B. Mon. 2; *Reeder v. Reeder*, 89 Ky. 529; *Shepardson v. Stevens*, 77 Mich. 256; *Pinger v. Pinger*, 40 Minn. 417; *Pironi v. Corrigan*, 47 N. J. Eq. 135; *Michel v. Hallheimer*, 56 Hun, 416; *Wilfong v. Johnson*, 41 W. Va. 283. If possession has been given, but no conveyance passed, ejectment or trespass will lie. *McDaniel v. Gray*, 69 Ga. 433; *Graves v. White*, 87 N. Y. 463; *Clough v. Hosford*, 6 N. H. 231; *Williams v. Noisieux*, 43 N. H. 388. See, also, *Ferris v. Hoglan*, 121 Ala. 240. Even where a conveyance had passed the vendor was allowed to treat it as null, and a conveyance to another was held effectual in *Thompson v. Westbrook*, 56 Tex. 265, and *Kennedy v. Embry*, 72 Tex. 387. But these cases were questioned in *Huffman v. Mulkey*, 78 Tex. 556, 561, and are opposed to *McCardle v. Kennedy*, 92 Ga. 198.

³ *Emanuel v. Dane*, 3 Camp. 299; *Power v. Wells*, Cowp. 818.

⁴ *Greaves v. Ashlin*, 3 Camp. 426; *Martindale v. Smith*, 1 Q. B. 389; *Gillard v. Brittan*, 8 M. & W. 575; *Page v. Cowasjee Eduljee*, L. R. 1 P. C. 127. But see the early case of *Langfort v. Tiler*, 1 Salk. 113. See, also, *Sale of Goods Act*, sect. 48; *Chalmers, Sale of Goods Act* (3d ed.), 91.

⁵ *Martindale v. Smith*, 1 Q. B. 389; *Page v. Cowasjee Eduljee*, L. R. 1 P. C. 127.

⁶ *Benjamin, Sales*, § 867; *Diem v. Koblit*, 48 Ohio St. 41.

⁷ *Barr v. Logan*, 5 Harr. (Del.) 52; *Code Ga.* § 3551; *Bagley v. Findlay*, 82 Ill. 524; *Ames v. Moir*, 130 Ill. 582; *Cook v. Brandeis*, 3 Metc. (Ky.) 555; *Young v. Mertens*,

has parted with both possession and title, there seems to be no authority, either in England or in this country, allowing him to bring trover or other action for the recovery of what he had transferred.¹

If the performance rendered consists of services, there cannot ordinarily, from the nature of legal remedies, be actual restitution, but it is possible to give the equivalent in value under a common count. Since money paid may be thus recovered back, and similarly in this country land, logic would require such a remedy; and it is allowed in part, but only in part. If the plaintiff has fully performed, the only redress he has for breach of contract by the other side is damages for the breach. It is true that if the performance to which he is entitled in return is a liquidated sum of money, he may sue in *indebitatus assumpsit* and not on the special contract,² but the measure of damages is what he ought to have received—not the value of what he has given.³ If, however, the plaintiff has only partly performed and has been excused from further performance by prevention or by the repudiation or abandonment of the contract by the defendant, he may recover,

27 Md. 114, 126; *Haskell v. Rice*, 11 Gray, 240; *Holland v. Rea*, 48 Mich. 218; *Warren v. Buckminster*, 24 N. H. 336; *Gordon v. Norris*, 49 N. H. 376; *Dustan v. McAndrew*, 44 N. Y. 72; *Hayden v. Demets*, 53 N. Y. 426; *Mason v. Decker*, 72 N. Y. 595; *Van Brocklen v. Smeallie*, 140 N. Y. 70; *McEachron v. Randles*, 34 Barb. 301; *McClure v. Williams*, 5 Sneed, 718; *Harvey v. Adams*, 9 Lea, 289, 291; *Rosenbaums v. Weeden*, 18 Gratt. 785. See, also, *Putnam v. Glidden*, 159 Mass. 47. In many of these cases the question was not actually involved.

The Indian Contract Act, sect. 107, also allows resale by the lienholder, though the title has passed, and though "the buyer must bear any loss," he "is not entitled to any profit which may occur on such resale."

¹ See *Benjamin, Sales*, § 766; *Power v. Wells*, Cowp. 818; *Emanuel v. Dane*, 3 Camp. 299; *Neal v. Boggan*, 97 Ala. 611, and cases cited; *Thompson v. Conover*, 32 N. J. L. 466. The Indian Contract Act, sect. 121, expressly denies the right to rescind after delivery, in the absence of express stipulation.

In *Dow v. Harkin*, 67 N. H. 383, however, the plaintiff, who had assigned a patent and conveyed tools to the defendant in consideration of an executory agreement which the defendant had failed to perform, was allowed to recover the tools as well as have the assignment set aside by proceedings in equity. The court intimated that the jurisdiction of equity arose from the assignment of the patent, but that as it took jurisdiction of the case it would also act in regard to the tools.

² *Keener, Quasi-Contracts*, 300; *Leake, Contracts* (3d ed.), 45; *Chitty, Pleadings* (7th ed.), i. 358; *Atkinson v. Bell*, 8 B. & C. 277, 283; *Gandall v. Pontigny*, 1 Stark. 198; *Savage v. Canning*, Ir. R. 1 C. L. 434; *Wardrop v. Dublin, etc. Cq.*, Ir. R. 8 C. L. 295; *Shepard v. Mills*, 173 Ill. 223; *Southern Bldg. Ass'n v. Price*, 88 Md. 155; *Nicol v. Fitch*, 115 Mich. 15.

³ *Keener, Quasi-Contracts*, 301; *Leake, Contracts* (3d ed.), 45; *Barnett v. Swering*, 77 Mo. App. 64, 71, and cases cited; *Porter v. Dunn*, 61 Hun, 310 (S. C. 131 N. Y. 314); and see cases in the preceding note.

either in England or America, the value of what he has given,¹ though such a remedy is no more necessary than where he has fully performed, since in both cases alike the plaintiff has an effectual remedy, in an action on the contract for damages. In some jurisdictions, if a price is fixed by the contract, that is made the conclusive test of the value of the services rendered.² More frequently, however, the plaintiff is allowed to recover the real value of the services though in excess of the contract price.³ The latter rule seems more in accordance with the theory on which the right of action must be based — that the contract is treated as rescinded and the plaintiff restored to his original position as nearly as possible.

While it is ordinarily the case that a party who seeks to rescind or avoid a contract because of a breach of contract or repudiation by the other party has performed at least in part and desires restitution of what he has given or its value, yet it seems to follow that the same course is open to one who has not performed at all. Such a person will not wish ordinarily to avoid the contract altogether, because that course would deprive him of any right of action whatever. He could seek neither restitution, because he had given nothing, nor compensation in damages for breach of the contract, because he had put an end to the promise on which he must sue. Nevertheless, there are many cases where the injured party is content merely to terminate his legal relations with the other party to the contract without more. That he may do this is perhaps

¹ *Mayor v. Pyne*, 3 Bing. 285; *Planché v. Colburn*, 8 Bing. 14; *Clay v. Yates*, 1 H. & N. 73; *Bartholomew v. Markwick*, 15 C. B. (N. S.) 711; *M'Connell v. Kilgallen*, 2 L. R. Ir. 119. But the right was denied as recently as 1802 in *Hulle v. Heightman*, 2 East, 145. Many American cases are collected *infra*, p. 325, *n*.

² *Chicago v. Sexton*, 115 Ill. 230; *Keeler v. Clifford*, 165 Ill. 544, 548; *Chicago Training School v. Davies*, 64 Ill. App. 503; *Western v. Sharp*, 14 B. Mon. 177; *Doolittle v. McCullough*, 12 Ohio St. 360 (much qualified by *Wellston Coal Co. v. Franklin Paper Co.*, 57 Ohio St. 182); *Harlow v. Beaver Falls Borough*, 188 Pa. 263, 266; *Noyes v. Pugin*, 2 Wash. 653.

³ *United States v. Behan*, 110 U. S. 338, 345; *Clover v. Gottlieb*, 50 La. Ann. 568; *Rodemer v. Hazlehurst*, 9 Gill, 288; *Fitzgerald v. Allen*, 128 Mass. 232; *Kearney v. Doyle*, 22 Mich. 294; *Hemminger v. Western Assurance Co.*, 95 Mich. 355; *McCullough v. Baker*, 47 Mo. 401; *Ehrlich v. Aetna L. I. Co.*, 88 Mo. 249, 257; *Clark v. Manchester*, 51 N. H. 594; *Clark v. Mayor*, 4 N. Y. 338; *Wellston Coal Co. v. Franklin Paper Co.*, 57 Ohio St. 182; *Derby v. Johnson*, 21 Vt. 17; *Chamberlin v. Scott*, 33 Vt. 80.

But in these jurisdictions the prices fixed in the contract are evidence (though not conclusive) of the value of the work. *Monarch v. Board of School Fund*, 49 La. Ann. 991; *Walsh v. Jenvey*, 85 Md. 240; *Fitzgerald v. Allen*, 128 Mass. 232, 234; *Eakright v. Torrent*, 105 Mich. 294.

intimated by Parke, B., in *Phillpotts v. Evans*;¹ it is expressly stated by Crompton, J., in *Hochster v. De La Tour*,² where the repudiation preceded the time for performance by either party. It was so decided in *King v. Faist*.³ There the plaintiff had stated he would not perform unless the defendant gave a guarantee which the contract did not require; whereupon the defendants wrote that they would not perform, and they did not. The plaintiffs sued for this failure to perform, but the court held it justified, saying: "Before the defendants were in default under the substituted contract, or had notified him of an intention not to perform it, he himself repudiated it by notifying them that he would not perform it on his part, and thus gave them the right to rescind the contract."⁴ This right may become of great importance if the contract while it exists operates as a threatened liability or a cloud on title. Thus if a contract for the sale of real estate is recorded, the owner has no longer a salable title, and if the purchaser fails to carry out his agreement, the owner, to regain a clear title to his land, will desire the rescission of the contract. In order that there may be recorded evidence of this a court of equity will decree the rescission and cancellation of such a contract.⁵ So one who has given negotiable paper in return for a promise which has been broken is entitled to proceed affirmatively for the rescission of the contract and the surrender of the negotiable paper, lest it should be negotiated by the holder to a *bona fide* purchaser for value without notice, to whom the maker would be liable.⁶

There seems to be no doubt that repudiation without any actual failure to perform the contract is enough to give rise to the right. This point is covered by the remark of Crompton, J., just referred to. So, in *Ballou v. Billings*,⁷ the court say: "Such a repudiation did more than excuse the plaintiff from completing a tender; it authorized him to treat the contract as rescinded and at an end.

¹ 5 M. & W. 475, 477. See, also, *Grimaldi v. White*, 4 Esp. 95.

² 2 E. & B. 678, 685. "When a party announces his intention not to fulfil the contract, the other side may take him at his word and rescind the contract."

³ 161 Mass. 449.

⁴ *Ib.* at p. 457. See, also, *Howe v. Smith*, 27 Ch. D. 89, 105; *Munsey v. Butterfield*, 133 Mass. 492; *Warters v. Herring*, 2 Jones L. (N. C.) 46.

⁵ *Howe v. Hutchison*, 105 Ill. 501; *Nelson v. Hanson*, 45 Minn. 543; *Kirby v. Harrison*, 2 Ohio St. 326.

⁶ See *Randolph on Commercial Paper* (2d ed.), §§ 1686, 1687; *Campbell Printing Press Co. v. Marsh*, 20 Colo. 22; *Duggar v. Dempsey*, 13 Wash. 396.

⁷ 136 Mass. 307, 308.

It had this effect, even if, for want of a tender, the time for performance on the defendants' part had not come, and therefore it did not amount to breach of covenant." And again, "It is clear that, apart from technical considerations, so far as the right to rescind goes, notice that a party will not perform his contract has the same effect as a breach."¹ But question is more likely to be made whether breach of contract without repudiation justifies rescission than whether repudiation without actual breach is sufficient. There are many expressions, chiefly in English cases, which seem to mean that repudiation, or abandonment of the contract is essential to give rise to the right of rescission. Thus, in *Ehrenspurger v. Anderson*, Parke, B., said, "In order to constitute a title to recover for money had and received, the contract on the one side must not only not be performed or neglected to be performed, but there must have been something equivalent to saying 'I rescind this contract,' . . . a total refusal to perform it, or something equivalent to that, which would enable the plaintiff on his side to say, 'If you rescind the contract on your part, I will rescind it on mine.'"² In accordance with this doctrine it was held that failure by the defendant to remit a bill of exchange did not justify the plaintiff to treat the contract as rescinded and sue in money had and received for restitution of what the defendant had received. In *Freeth v. Burr*,³ the court, and particularly Lord Coleridge, laid stress on the question whether the breach of contract amounted to an "abandonment of the contract or a refusal to perform it on the part of the person so making default;" and in *Mersey Steel and Iron Co. v. Naylor*, the Earl of Selborne, citing Lord Coleridge's statement, expressed the same view even more explicitly.⁴ This doctrine, though perhaps it is that of the English

¹ P. 309. See, also, *Drake v. Goree*, 22 Ala. 409; *Elder v. Chapman*, 176 Ill. 142; *Festing v. Hunt*, 6 Manitoba, 381.

² 3 Ex. 148, 158. This is quoted in Keener on Quasi-Contracts, 304, as a correct exposition of the law. Similar expressions may be found in *Fay v. Oliver*, 20 Vt. 118, 122.

³ L. R. 9 C. P. 208, 214. Reliance was placed on earlier expressions in *Withers v. Reynolds*, 2 B. & Ad. 882, and *Jonassohn v. Young*, 4 B. & S. 296. See, also, the language of Coleridge, J., in *Franklin v. Miller*, 4 A. & E. 599.

⁴ 9 App. Cas. 434, 438. In both *Freeth v. Burr* and *Mersey Steel and Iron Co. v. Naylor*, the question was not directly as to the right of rescission, but as to the right of a party to maintain an action on the express contract when himself in default. In both those cases such an action was held maintainable, in part at least because the default relied on did not show an intention to abandon the whole contract. It seems clear, however, that a default which is not sufficient to warrant the other party in refusing to perform his promise, and is no answer to an action on that promise, will not

law to-day,¹ must be regarded as erroneous in principle and unfortunate in practice. It seems to be based in large part on the notion that, in order to justify such a rescission of the contract, mutual assent of the parties must be established — an offer by the party in default accepted by the other party.² In almost any case this

entitle him to treat the contract as rescinded. These cases may, therefore, be cited in this connection. It is without the scope of the present article to criticise fully the doctrine so far as it relates to the sufficiency of the plaintiff's non-performance without repudiation or abandonment of the contract as a defence to an action upon it, but it may be briefly pointed out that if a party to a contract fails to perform, it is immaterial to the other party whether the default is wilful or negligent, and if the contract has been substantially broken already it does not help matters that the wrong-doer has the best intentions for the future. Lord Blackburn, in commenting on the Earl of Selborne's statement, might have put more strongly than he did the implied criticism of its adequacy: "That is, I will not say the only ground of defence, but a sufficient ground of defence." 9 App. Cas. 434, 443.

In some American cases, also, it has been said that mere breach of contract does not justify rescission unless an intention is manifested to be no longer bound by the contract, or unless the wrong-doer has prevented performance by the other party. *Wright v. Haskell*, 45 Me. 489 (see, also, *Dixon v. Fridette*, 81 Me. 122); *Blackburn v. Reilly*, 47 N. J. L. 290; *Trotter v. Heckscher*, 40 N. J. Eq. 612; *Graves v. White*, 87 N. Y. 463; *Hubbell v. Pacific Mut. Ins. Co.*, 100 N. Y. 41, 47 (comp. *Bogardus v. N. Y. Life Ins. Co.* 101 N. Y. 328); *Suber v. Pullin*, 1 S. C. 273. But it is to be noticed that it is much easier to find cases where such expressions are used, than it is to find cases where it was actually held that a breach so material as to make the partial performance of the contract different in substance from the performance promised was insufficient ground for rescission because no intention was manifested to refuse absolutely to perform in the future. Thus, in spite of the remarks in some New York cases, it was held in *Welsh v. Gossler*, 89 N. Y. 540, that a contract to ship in May or June might be rescinded for non-performance of this requirement, though there was so far from an absolute repudiation that shipment was actually made in July and the cargo tendered. This was followed in *Hill v. Blake* 97 N. Y. 216. See, also, *Mansfield v. N. Y. Central R. R. Co.*, 102 N. Y. 205.

¹ See, in addition to the cases cited in the previous note, *Cornwall v. Henson*, L. R. [1900] 2 Ch. 298; *In re Phoenix, etc. Co.*, 4 Ch. D. 108; *Bloomer v. Bernstein*, L. R. 9 C. P. 588. There are strong expressions to the same effect in Colonial decisions. In *Bradley v. Bertoumieux*, 17 Victorian L. R. 144, 147, it is said: "A contract broken is not a contract rescinded, and unless one of the parties to the contract clearly intimates his intention not to perform his contract, or his inability to perform it, the other party is not at liberty to rescind the contract." So in *Oaten v. Stanley*, 19 Victorian L. R. 553, 555, "The point is whether the person who committed the breach meant to abandon the contract." And see, to similar effect, *Prendergast v. Lee*, 6 Victorian L. R. (Law) 411; *Hacker v. Australian, etc. Co.*, 17 Victorian L. R. 376; *Midland Ry. Co. v. Ontario Rolling Mills*, 10 Ont. App. 677. See, however, *Muston v. Blake*, 11 S. C. New South Wales, 92.

² Thus, Coleridge, J., in *Franklin v. Miller*, 4 A. & E. 599, says: "The rule is that, in rescinding, as in making a contract, both parties must concur," and, "therefore, the refusal which is to authorize the rescission of the contract must be an unqualified one." See, also, the reasoning of Lord Esher in *Johnstone v. Milling*, 16 Q. B. D. 460, 467. And in an American case it is said: "Where one of the contracting parties absolutely

can be established only by resorting to the baldest fiction. As matter of theory a man who repudiates a contract no more than one who negligently breaks it offers to rescind it, and if he did, his offer could only be construed as expressing a willingness to drop matters as they stood at the time, not with the addition imposed by the court of making restitution of what he has received.¹ And as a practical question the only important consideration is how defective the performance of a contracting party has been or is likely to be, not whether it was negligence or wilfulness on his part that led him to break his promise. In truth rescission is imposed *in invitum* by the law at the option of the injured party, and it should be, and in general is, allowed not only for repudiation or total inability, but also for any breach of contract of so material and substantial a nature as should constitute a defence to an action brought by the party in default for a refusal to proceed with the contract.²

refuses to perform, such refusal . . . will be regarded as equivalent to a consent on his part to a rescission of the contract, and the other contracting party may, if he choose, so treat it, rescind the contract, and if he have done anything under it, may immediately sue for compensation on a *quantum meruit*." *Shaffner v. Killian*, 7 Ill. App. 620. So in *Cromwell v. Wilkinson*, 18 Ind. 365, 370; *Stevens v. Cushing*, 1 N. H. 17, 18; *Dow v. Harkin*, 67 N. H. 383, and other cases.

¹ How inadequate any doctrine of mutual consent is to account for even the English cases may be seen from the decision in *Clay v. Yates*, 1 H. & N. 73. The plaintiff contracted to print for the defendant a second edition of a treatise with a new dedication, which had not then been written. After the treatise was printed the plaintiff discovered that the dedication which had been furnished him was libellous and refused to complete the fulfilment of the contract. He was held entitled to recover for the printing he had done. Here the defendant, so far from assenting to a rescission of the contract, demanded that it should be performed. The plaintiff recovered because the defendant had given ground for, though not assented to, the interruption of the contract.

Rescission by mutual consent is, of course, an entirely possible solution for parties to elect when they are disputing over a contract. An instance of it is to be found in *Skillman Hardware Co. v. Davis*, 53 N. J. L. 144. The court found from the conduct of the parties that there had been rescission by mutual consent. See, also, *Hobbs v. Columbia Falls Brick Co.*, 157 Mass. 109. Neither party is entitled to damages in such a case without special agreement. *Leake, Contracts* (3d ed.), 52.

² *Panama, etc. Co. v. India, etc. Co.* L. R. 10 Ch. 515, 532 (*semble*); *Phillips, etc. Co. v. Seymour*, 91 U. S. 646; *Farmers' L. & T. Co. v. Galesburg*, 133 U. S. 156; *Watson v. Ford*, 93 Fed. Rep. 359; *Powell v. Sammons*, 31 Ala. 552; *Ferris v. Hoagland*, 121 Ala. 240; *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500; *San Francisco Bridge Co. v. Dumbarton Co.*, 119 Cal. 272; *Campbell Printing Press Co. v. Marsh*, 20 Colo. 22; *Code of Georgia*, § 3712; *Bacon v. Green*, 36 Fla. 325; *Harrison Machine Works v. Miller*, 29 Ill. App. 567; *Wolf v. Schlacks*, 67 Ill. App. 117; *Cromwell v. Wilkinson*, 18 Ind. 365; *Anderson v. Haskell*, 45 Ia. 45; *Wernli v. Collins*, 87 Ia. 548; *Stahelin v. Sowle*, 87 Mich. 124; *Robson v. Bohn*, 27 Minn. 333; *Nelson v. Hanson*, 45 Minn. 543; *Gulich v. Alford*, 61 Miss. 224; *Mugan v. Regan*, 48 Mo. App. 461;

If a contract has been partly performed by the party in default, the other party, at least if he has received any benefit from such part performance, cannot ordinarily rescind the contract according to the English law. Even though he return what he has received, it is said the parties cannot be restored to their original position, because he has had the temporary enjoyment of the property. In the leading case of *Hunt v. Silk*,¹ the plaintiff, who sought to recover money he had paid under an agreement for a lease, because of the defendant's failure to make repairs as agreed, had had possession of the premises a few days. This was held fatal. Lord Ellenborough said: "If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account?" *Hunt v. Silk* has been consistently followed.² It is in accordance with this rule that a buyer is not allowed to rescind a contract for breach of warranty,³ though there is the additional reason in the case of a warranty that it is said to be a collateral contract. In the United States the law is more liberal. It is universally agreed that rescission is not allowable unless the party seeking to rescind can and does first restore or offer to restore anything he has received under the contract,⁴ but the construction of this rule is far less severe than in England. Though it is frequently said that "A contract cannot ordinarily be rescinded unless both parties can be reinstated in their original situation in

Oliver v. Goetz, 125 Mo. 370; *Drew v. Claggett*, 39 N. H. 431; *Foster v. Bartlett*, 62 N. H. 617; *Patridge v. Gildermeister*, 1 Keyes, 93; *Welsh v. Gossler*, 89 N. Y. 540; *Hill v. Blake*, 97 N. Y. 216; *North Dak. Civ. Code*, § 3932; *Rummington v. Kelley*, 7 Ohio, pt. 2, 97; *Higby v. Whittaker*, 8 Ohio, 198; *Kirby v. Harrison*, 2 Ohio St. 326; *Oklahoma Stats.* § 866; *Miller v. Phillips*, 31 Pa. 218; *Greene v. Haley*, 5 R. I. 260; *Bennett v. Shaughnessy*, 6 Utah, 273; *Fletcher v. Cole*, 23 Vt. 114; *Preble v. Bottom*, 27 Vt. 249; *Meeker v. Johnson*, 5 Wash. 718; *School District v. Hayne*, 46 Wis. 511. Many earlier decisions are cited in the cases above.

¹ 5 East, 449.

² *Beed v. Blandford*, 2 Y. & J. 278; *Street v. Blay*, 2 B. & Ad. 456, 464; *Blackburn v. Smith*, 2 Ex. 783. See, also, *Heilbutt v. Hickson*, L. R. 7 C. P. 438, 451.

³ *Street v. Blay*, 2 B. & Ad. 456; *Gompertz v. Denton*, 1 C. & M. 207; *Poulton v. Lattimore*, 9 B. & C. 259; *Parsons v. Sexton*, 4 C. B. 899; *Dawson v. Collis*, 10 C. B. 523. So provided in the Indian Contract Act, sect. 117.

⁴ *Code of Georgia*, § 3712; *Summerall v. Graham*, 62 Ga. 729; *Clover v. Gottlieb*, 50 La. Ann. 568; *Miner v. Bradley*, 22 Pick. 457; *Clark v. Baker*, 5 Met. 452; *Snow v. Alley*, 144 Mass. 546; *Gullich v. Alford*, 61 Miss. 224; *Doughten v. Camden Assoc.*, 41 N. J. Eq. 556; *Gale v. Nixon*, 6 Cow. 445; *North Dak. Civ. Code*, § 3034; *Brown v. Witter*, 10 Ohio, 142; *Oklahoma Stats.* § 868; *Potter v. Taggart*, 54 Wis. 395; 50 Am. Decisions, 674, *n.*; 74 Am. Decisions, 661, *n.*

respect of their contract. And if one party have already received benefit from the contract he cannot rescind it wholly, but is put to his action for damages,"¹ or the like, yet some courts have gone very far in allowing a rescission upon restitution *in specie* of what had been given in spite of benefits derived from temporary possession.² Thus, in many of the states, rescission is allowed for breach of warranty.³ The most satisfactory disposition of many cases where the plaintiff cannot, without any fault on his part, return all he has received, would be to allow the plaintiff to recover subject to a

¹ Story, Contracts, § 977. See, also, *Moore v. Barr*, 11 Ia. 198; *Burge v. Cedar Rapids, etc. R. R. Co.*, 32 Ia. 101; *Stevenson v. Polk*, 71 Ia. 278; *Handforth v. Jackson*, 150 Mass. 149; *Spencer v. St. Clair*, 57 N. H. 9, 13; *Fay v. Oliver*, 20 Vt. 118.

² In *Ankeny v. Clark*, 148 U. S. 345, the plaintiff was allowed to recover the full value of wheat delivered by him to the defendant, on surrendering possession of land which the defendant had contracted but failed to convey, though the plaintiff had had possession of the land for over four years, and this possession was admitted to be worth over two thousand dollars. The cases cited by the court in support of its position merely establish the point that if the suit had been reversed the vendor could not have recovered for the use and occupation of the land — a different matter. Contrary to *Ankeny v. Clark*, but not cited in that case, are *Axtel v. Chase*, 77 Ind. 74, 83 Ind. 546, 554; *Fay v. Oliver*, 20 Vt. 118. *Conf.*, however, *Nothe v. Nomer*, 54 Conn. 326. In *Campbell Printing Press, etc. Co. v. Marsh*, 20 Colo. 22, it was held that one who had received and used a printing press might return it and rescind his contract on the failure of the seller to furnish another piece of machinery included in the bargain, though the market value of the press was impaired by the fact that it had been used. The same principle is necessarily involved in the decisions which allow rescission for breach of warranty. See the following note. In *Benson v. Cowell*, 52 Ia. 137, the plaintiff was allowed to rescind on returning money of which he had had the use, without being required to pay interest.

³ *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Hoult v. Baldwin*, 67 Cal. 610 (*conf.* Cal. Civ. Code, § 1786); *Sparling v. Marks*, 86 Ill. 125; *Rogers v. Hanson*, 35 Ia. 283; *Upton Mfg. Co. v. Huiske*, 69 Ia. 557; *Craver v. Hornburg*, 26 Kas. 94; *Milliken v. Skillings*, 89 Me. 180; *Franklin v. Long*, 7 Gill & J. 407; *Bryant v. Isburgh*, 13 Gray, 607; *Gilmore v. Williams*, 162 Mass. 351, 352; *Branson v. Turner*, 77 Mo. 489; *Kerr v. Emerson*, 64 Mo. App. 159; *Davis v. Hartlerode*, 37 Neb. 864; *Canham v. Plano Mfg. Co.*, 3 N. Dak. 229 (*conf.* N. Dak. Civ. Code, § 3988); *Byers v. Chapin*, 28 Ohio St. 300; *Osborne v. Poindexter*, (Tex. Civ. App.) 34 S. W. Rep. 299; *Warder v. Fisher*, 48 Wis. 338; *Minn. Threshing Co. v. Wolfram*, 96 Wis. 481; *Mader v. Jones*, 1 Russ. & Chesley (Nova Scotia), 82.

But many states follow the English rule and do not allow rescission for breach of warranty. *Thornton v. Wynn*, 12 Wheat. 183; *Trumbull v. O'Hara*, 71 Conn. 172; *Woodruff v. Graddy*, 91 Ga. 333; Code, Ga. § 3556; *Marsh v. Lord*, 55 Ind. 271; *Wulschner v. Ward*, 115 Ind. 219, 222; *Lightburn v. Cooper*, 1 Dana, 273; *Merrick v. Wiltse*, 3 Minn. 41 (*conf.* *Close v. Crossland*, 47 Minn. 500); *Muller v. Eno*, 14 N. Y. 597; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 269; *Freyman v. Knecht*, 78 Pa. 141; *Eshleman v. Lightner*, 169 Pa. 46; *Kauffman Milling Co. v. Stuckey*, 40 S. C. 110; *Hull v. Caldwell*, 3 S. Dak. 451; *Allen v. Anderson*, 3 Humph. 581; *Wright v. Davenport*, 44 Tex. 164; *Matteson v. Holt*, 45 Vt. 336; *Mooers v. Gooderham*, 14 Ont. 451.

deduction for what he has received and cannot return, and some authorities seem to support such a solution of the problem.¹

The right of rescission is frequently stated as if it were confined to simple contracts;² and it is obvious that it is inconsistent with the early common law doctrines in regard to dissolution of sealed contracts to allow matter *in pais* to afford ground for their rescission. But in many jurisdictions in this country a seal no longer has its common law effect, and it is clear that at least in some jurisdictions where a seal still retains its old importance so far as to make consideration for a promise unnecessary, a contract under seal may be rescinded or avoided for breach of promise by one party at the suit of the other, and a recovery had on a *quantum meruit*. This was so held in *Ballou v. Billings*.³ Holmes, J., in delivering the opinion of the court, refers to earlier Massachusetts decisions which had decided that a contract under seal might be rescinded by parol, and adds, "Whether these cases would have been decided the same way in earlier times or not, we have no disposition to question them upon this point, and it is going very little further to hold that such a contract may be rescinded if it is repudiated by the other side."⁴ In other jurisdictions, however, such relaxation of common law doctrines has not as yet been sanctioned.⁵

¹ See Keener, *Quasi-Contracts*, 305; *Wilson v. Burks*, 71 Ga. 862; *Todd v. Leach*, 100 Ga. 227; *Brewster v. Wooster*, 131 N. Y. 473; *Mason v. Lawing*, 10 Lea, 264.

In *Higby v. Whittaker*, 8 Ohio, 198, and *Hood v. People's, etc. Assoc.*, 8 Tex., Civ. App. 385, the vendor was allowed to recover land for which he had received part payment without returning what he had received, on the ground that the possession which the vendee had enjoyed equalled in value this part payment. See, also, *McDaniel v. Gray*, 69 Ga. 433; *Travelers Ins. Co. v. Redfield*, 6 Col. App. 190.

² See *e. g.* *Ankeny v. Clark*, 148 U. S. 345, 353, quoting from *Smith's Leading Cases*; *Weart v. Hoagland's Adm.* 2 Zab. 517, 519; *Fay v. Oliver*, 20 Vt. 118, 122; *Brown v. Ralston*, 9 Leigh, 532, 545; *Festing v. Hunt*, 6 Manitoba, 381, 384.

³ 136 Mass. 307.

⁴ This was allowed also in 1803 in *Weaver v. Bentley*, 1 Caines, 47, and see the following note.

⁵ *Atty v. Parish*, 1 B. & P., N. R. 104; *Middleditch v. Ellis*, 2 Ex. 623; *McManus v. Cassidy*, 66 Pa. 260. (But see *Am. Life Ins. Co. v. McAden*, 109 Pa. 399.)

Professor Keener, in his excellent work on *Quasi-Contracts* (p. 308), draws the distinction from the cases cited above in this and the two preceding notes, that where money has been paid by the plaintiff it may be recovered from a defendant who is in default though the contract was under seal, but where services have been rendered or property other than money delivered the plaintiff's only remedy is on the contract, if it is under seal. Possibly the case of *Greville v. Da Costa, Peake*, A. C. 113, taken in connection with the English cases cited above, may lend some support to this view, but the American cases certainly do not seem to warrant the distinction. On the one hand, in *Weaver v. Bentley*, the plaintiff, who had given notes, money, and farm stock, was apparently allowed to recover for the property as well as the money; and later New York cases

A party who has himself been guilty of a substantial breach of contract cannot rescind the contract because of subsequent refusal or failure to perform by the other party.¹

As rescission is only an alternative remedy, and is in derogation of the contract, a party who wishes to avail himself thereof must manifest his election in some way;² and must do so without

make it evident that the law of that state made no such distinction. See *Jewell v. Schroepel*, 4 Cow. 564; *Allen v. Jaquish*, 21 Wend. 628. Certainly, also, the court in *Ballou v. Billings* indicate no intention to rest that case on the fact that the plaintiff had paid money instead of rendering services or delivering property, but rather broadly decide that contracts under seal generally may be rescinded or avoided for breach. This was decided, also, in regard to a contract for work and labor in *Webster v. Enfield*, 10 Ill. 298. See, also, *Wolf v. Schlacks*, 67 Ill. App. 117, 118. A dictum by Redfield, J., in *Myrick v. Slason*, 19 Vt. 121, 126, points in the same direction. On the other hand, though the cases where the plaintiff was not allowed to recover were in fact actions for the value of services or property, there is nothing to indicate that the courts so deciding would have treated the plaintiff better had he been suing for money paid. Indeed, a contrary inference seems justified.

¹ *Horne v. Smith*, 27 Ch. D. 89; *Kane v. Jenkinson*, 10 Nat. B. R. 316; *Baston v. Clifford*, 68 Ill. 67; *Downey v. Riggs*, 102 Ia. 88; *Getty v. Peters*, 82 Mich. 661; *Green v. Green*, 9 Cow. 46; *Ketchum v. Evertson*, 13 Johns. 359, 364; *Higgins v. Eagleton*, 155 N. Y. 466; *Ashbrook v. Hite*, 9 Ohio St. 357. See, also, *Hickock v. Hoyt*, 33 Conn. 553; *Wilkinson v. Blount*, 169 Mass. 374. This principle, however, is only accepted with much qualification in many states. The right of one who is himself in default to recover compensation for what he has done is beyond the scope of this article. It is fully treated in Keener on Quasi-Contracts, 214 *et seq.*

² *Avery v. Bowden*, 5 E. & B. 714; *Reid v. Hoskins*, 5 E. & B. 729; *Cornwall v. Henson*, L. R. (1900) 2 Ch. 298; *Hennessy v. Bacon*, 137 U. S. 78; *Carney v. Newberry*, 24 Ill. 203; *Graham v. Holloway*, 44 Ill. 385; *Mullin v. Bloomer*, 11 Ia. 360; *Supple v. Iowa State Ins. Co.*, 58 Ia. 29; *Weeks v. Robie*, 42 N. H. 316; *Swazey v. Choate Mfg. Co.*, 48 N. H. 200; *Andrews v. Cheney*, 62 N. H. 404 (*conf.* *Dow v. Harkin*, 67 N. H. 383); *Levy v. Loeb*, 89 N. Y. 386, 390; *Higbee v. Whittaker*, 8 Ohio, 198; *Kirby v. Harrison*, 2 Ohio St. 326; *Phillips v. Herndon*, 78 Tex. 378.

The way in which election must be manifested may vary in different cases. Formal notice is certainly not always requisite. In *Thresher v. Stonington Bank*, 68 Conn. 201; *Graham v. Holloway*, 44 Ill. 385; *Brown v. St. Paul, etc. Ry. Co.*, 36 Minn. 236; *Graves v. White*, 87 N. Y. 463, it was held that bringing an action for restitution promptly was sufficient; and see *Kirby v. Harrison*, 2 Ohio St. 326. In New Hampshire, however, it is held some manifestation of election must precede such an action. See New Hampshire cases cited above. In Texas it is laid down, at least in cases of sales of real estate, that "where there has been part performance by the vendee, as paying a portion of the purchase money or taking possession and making improvements under the contract, he would be entitled to reasonable notice of the vendor's intention to rescind. The reason of this rule is obvious. He may be able to give a reasonable excuse for his failure to fully perform that would entitle him in equity to protection to the extent he had performed. If the vendee has actually abandoned the contract or has so acted as to create the reasonable belief on the part of the vendor that he has abandoned it, the vendor may rescind without notice of his intention, notwithstanding the part performance by the vendee." *Kennedy v. Embry*, 72 Tex. 387, 390.

Where no time is fixed by the contract or where time is not of the essence, the

undue delay.¹ Election once made determines the plaintiff's rights.²

There are a few minor inconsistencies in applying or failing to apply the rule allowing restitution as an alternative remedy for breach of contract.³ These inconsistencies are unfortunate, as they not only are at variance with logical theory, but seem to rest on no adequate foundation of practical convenience. They should, therefore, where it is possible, be swept away by future decisions.

It may seem that the whole doctrine of allowing restitution when an adequate remedy on the contract exists is anomalous;⁴ and from a technical point of view this may be so. But the doctrine must have the merit either of practical convenience or of conformity to men's sense of fairness, for the history of the civil law

injured party may by notice fix a reasonable time after which the contract, if not performed, will be treated as abandoned. *Green v. Levin*, 13 Ch. D. 589; *Cover v. McLaughlin*, 18 N. S. Wales, 107, and decisions collected in 50 Am. Decisions, 678, n.

¹ *Carney v. Newberry*, 24 Ill. 203; *Axtel v. Chase*, 77 Ind. 74, 83 Ind. 546, 554; *Mills v. Osawatomie*, 59 Kas. 463; *Lawrence v. Dale*, 3 Johns. Ch. 22; *Caswell v. Black River Mfg. Co.*, 14 Johns. 453; *North Dakota Civ. Code*, § 3934; *Oklahoma Stats.* § 868; *Thomas v. McCue*, 19 Wash. 287; 74 Am. Dec. 662, n.

² *Goodman v. Pocock*, 15 Q. B. 576; *Routledge v. Hislop*, 29 L. J. (N. S.) M. 90; *Wolff v. Pickering*, 12 S. C. of Cape of Good Hope, 429. *Conf. Savage v. Canning*, Ir. R. 1 C. L. 434.

³ Thus, one who has sold goods to another, who has agreed to give a bill or note made by himself payable at a future day and who has failed to do so, cannot, it is generally held, recover in *indebitatus assumpsit* the value of the goods delivered until the stipulated period of credit has expired. *Mussen v. Price*, 4 East, 147; *Dutton v. Solomonson*, 3 B. & P. 582; *Manton v. Gammon*, 7 Ill. App. 201 (*conf. Dunsworth v. Wood Machine Co.*, 29 Ill. App. 23); *Carson v. Allen*, 6 Dana, 395; *Hanna v. Mills*, 21 Wend. 90. Yet the failure to give the promised bill or note is surely a material breach. And so it was held in *Stocksdale v. Schuyler*, 29 N. Y. St. Rep'r, 380 (*affd.* in 130 N. Y. 674). See, also, *Tyson v. Doe*, 15 Vt. 571; *Jaquith v. Adams*, 60 Vt. 392.

If a bill or note signed by a third person should have been given, the contract may be rescinded on action brought at once.

Again, it has been held that a plaintiff cannot recover the money value of goods or services given to the defendant if by the contract he was to receive not money but goods or services. *Harrison v. Luke*, 14 M. & W. 139 (*conf. Keys v. Harwood*, 2 C. B. 905); *Anderson v. Rice*, 20 Ala. 239; *Oswald v. Godbold*, 20 Ala. 811; *Eastland v. Sparks*, 22 Ala. 607; *Bernard v. Dickins*, 22 Ark. 351; *Baldwin v. Lessner*, 8 Ga. 71; *Cochran v. Tatum*, 3 T. B. Mon. 404; *Slayton v. McDonald*, 73 Me. 50; *Pierson v. Spaulding*, 61 Mich. 90; *Mitchell v. Gile*, 12 N. H. 390; *Weart v. Hoagland's Adm.*, 2 Zab. 517; *Brooks v. Scott's Exec.*, 2 Munf. 344; *Bradley v. Levy*, 5 Wis. 400. But see *contra*, *Sullivan v. Boley*, 24 Fla. 501; *Stone v. Nichols*, 43 Mich. 16; *Dikeman v. Arnold*, 78 Mich. 455; *Brown v. St. Paul Ry. Co.*, 36 Minn. 236; *Clark v. Fairfield*, 22 Wend. 522; *Way v. Wakefield*, 7 Vt. 223; *Wainwright v. Straw*, 15 Vt. 215. And see *Jackson v. Hall*, 53 Ill. 440.

⁴ Professor Keener so regards it, and finds in the anomalous character of the remedy a reason for some of its illogical limitations. *Quasi-Contracts*, 306.

shows even more strikingly than that of the common law the development of the doctrine, in spite of ancient rules to the contrary, that a person aggrieved by breach of contract may have rescission and restitution. The Roman law, like the early English law, did not allow this, but it was permitted by the Code Napoléon, and consequently is permitted now not only in France, but in the numerous countries which have copied French legislation. Germany clung longest to the old Roman rule, but in contracts within the commercial code the remedy in question has been authorized since 1861-1868, when a uniform commercial code was gradually adopted by the various German states, and since January 1, 1900, under the Bürgerliches Gesetzbuch the remedy is well-nigh uniformly allowable.¹

The same tendency may be observed in another direction. The Indian Contract Act, though supposed to be generally a codification of contracts, seems to go beyond the law of England in allowing rescission.²

Samuel Williston.

¹ See 13 HARVARD LAW REVIEW, 84, 85, 94-95.

² Sect. 39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

See, also, sect. 53, which allows rescission because of prevention of performance, and sect. 107, which allows a vendor who has parted with title but retained a lien to make a resale of the goods.

It should be said, however, that the court in *Sooltan Chund v. Schiller*, 4 Calcutta, 252, showed a tendency to restrict the effect of sect. 39.

[To be continued.]

ULTRA VIRES CORPORATION LEASES.¹

THE title of this paper sufficiently indicates its scope. I propose to consider this one question, namely, What is the legal effect of a lease which is *ultra vires*, or beyond the powers of the corporation executing it? The question appears to be a simple one, and the answer equally simple. In reality there lurks in the question itself a fallacy which renders it impossible to answer the question except by an elaborate explanation. The fallacy lies in the use of the term *vires*, or powers, which, if not necessarily ambiguous, is almost certain to create an ambiguous impression. A corporation is organized under a special charter or a general act which provides that the corporation may do certain things, and either expressly or by implication that it may not do other things. The corporation executes a lease which is not authorized by the provisions of its charter. This lease is said to be *ultra vires* or beyond the powers of the corporation. What is its legal effect? We are here concerned not with any question as to the construction of corporate charters, but simply with the effect of leases clearly unauthorized by such charters.

It is obvious that there are three possible objections to the validity of any *ultra vires* act.

The first is that the corporation has no power—that is to say, no legal capacity to produce the intended legal result.

The second is that the act in question is illegal because forbidden by some rule of law.

The third is that the act is a violation of the equitable right of the members of the corporation to have the property of the corporation applied exclusively to corporate purposes, as those purposes are determined by the charter or fundamental law of the corporation.

The third objection clearly has no force where all the members of the corporation assent to or ratify the act in question. The first two objections, however, are equally valid, whether the corporate act is sanctioned by the unanimous vote of the members, or by a mere majority. It is these two objections, then, in so far as they

¹ A paper read before the American Bar Association at Saratoga Springs, August 28, 1900.

bear upon corporate leases, that it is proposed to consider ; leases having been selected for discussion because a lease is an instrument of so complex a character that it illustrates to the best advantage the present condition of the law of *ultra vires*.

A lease is, in the first place, a bilateral contract, imposing obligations on both lessor and lessee. In the second place, it is a conveyance by which a certain estate is conveyed by the lessor to the lessee. As the rules governing contracts differ in important particulars from those governing conveyances, *ultra vires* leases will be discussed first, as contracts, and second, as conveyances.

By hypothesis the lease is *ultra vires* or beyond the power of the corporation. "It is obvious," says Mr. Morawetz,¹ "that the words *powers* and *vires* are here used in the sense of authority or right, and not in the sense of ability." If this were obvious to everybody, the objection that the corporation has no legal capacity to make the lease would be eliminated, and the discussion of our subject simplified. Unfortunately, the word *powers* may mean either ability or authority, and is therefore ambiguous. The poverty of the vocabulary of our jurisprudence has often been lamented. We have in many cases only one word to express two or more different ideas — a misfortune which is aggravated, rather than mitigated, by the fact that in other cases we have several words to express only one idea. The ambiguity thus arising has been one of the most fruitful sources of uncertainty and confusion in our textbooks and our judicial opinions. There may be some word in our legal vocabulary which, while capable of two meanings, is always used by lawyers in only one of those meanings. If there is such a word at the present day, only one thing can be said about it — the first lawyer who finds the other meaning more favorable to his client's case will use the word in that other meaning in his next argument. Inasmuch, then, as the word *powers* may be used in the sense of ability or capacity as well as in that of authority or right, we are not surprised to find that it has been so used. "To deny," says Mr. Morawetz,² "that corporations are able to enter into contracts and do frequently enter into contracts and do acts in excess of their chartered powers, is to deny an unalterable and self-evident fact." As opposed to this, we have the language of Mr. Justice Gray in *Central Transportation Co. v. Pullman Co.*,³ who says that a contract *ultra vires* is unlawful and void "because the corporation by the law of its creation is *incapable* of making it.

¹ Corporations, § 648.

² *Ib.* § 649

³ 139 U. S. 24 (1891).

The objection to the contract is not merely that the corporation ought not to have made it, but that it *could not* make it." The question is, he continues, "whether the lease sued on is unlawful and *void for want of legal capacity* in the plaintiff to make it."¹ So also Lord Cairns in *Ashbury Co. v. Riche*:² "The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract."³ Such language shows clearly that the question of the legal capacity of the corporation as affecting the validity of its *ultra vires* acts is not to be determined simply by saying that corporations do enter into contracts in excess of their chartered powers, and that the sole objection to the validity of such contracts is their illegality. A married woman at common law could enter into a contract in one sense; she could sign, seal, and deliver a deed, but the deed was not her legal act, because she lacked legal capacity to contract. The corporation is a person by definition. Is the contractual capacity of this person general, like that of a natural person, or has the corporate person only partial or limited capacity? Chief Justice Marshall thought that the corporation derived all its powers from the act creating it, and was capable of exerting its faculties only in the manner which that act authorized.⁴ The doctrine of special capacity has also found favor in some English cases.⁵ A learned writer⁶ in the *Encyclopedia of the Laws of England*,⁷ speaking of the sphere of corporate powers defined by the charter, says, "outside this sphere it is stricken with impotence." The language of Mr. Justice Gray previously quoted has often been cited with approval, as, for example, by the Supreme Court of Illinois in a very recent case⁸ which settled the law of that state in regard to *ultra vires* contracts. These citations show that the doctrine of special capacity is still entitled to respectful consideration. It is not, however, the prevailing view to-day, and in spite of the apparent authority in support of it, no dependence can be placed upon it. The objection to the doctrine is well stated by Sir Frederick Pollock⁹ as follows: "All rights are in one sense creatures of the law, and it is in a special sense by creation of the law that

¹ 139 U. S. 59, 60 (1891).

² L. R. 7 H. L. 653 (1875).

³ *Ib.* 672.

⁴ *Head v. Providence Insurance Co.*, 2 Cranch, 127, 169 (1804); *Bank of U. S. v. Dandridge*, 12 Wheaton, 64, 99 (1827).

⁵ Pollock, *Contracts*, Appendix D.

⁶ Mr. E. Manson.

⁷ Vol. xii. p. 360.

⁸ *National Home Building Ass'n v. Bank*, 181 Ill. 35, 45 (1899).

⁹ *Contracts* (2d Am. ed.), 121.

artificial persons exist at all. But when you have got your artificial person, why call in a second special creation to account for its rights?" The view now generally accepted, therefore, is that the contractual capacity of a corporation is as extensive as that of a natural person; that an act beyond the powers of a corporation is open to attack, not on the ground that it is impossible, but that it is illegal for the corporation to do the act.¹ An *ultra vires* lease, therefore, may be regarded simply as a corporate act which is illegal. Why is the act illegal, and what is the effect of the illegality?

The illegality of an *ultra vires* act may rest on one of three grounds:—

First. The act may be objectively illegal; that is, illegal for any person to do.

Second. The corporation may be forbidden by statute to do the act.

Third. *Ultra vires* acts may be illegal at common law, because regarded as injurious to the public welfare.

In the case of an *ultra vires* lease all three grounds of illegality may be present. If the corporation is under obligation to the public, as in the case of a railroad company, the alienation by lease or otherwise of property necessary to enable it to fulfil that obligation is clearly an illegal act. Again, if a statute forbids the lease, either expressly or by implication, it is unlawful. The English doctrine of the invalidity of *ultra vires* acts of companies rests upon the construction placed by the House of Lords, in *Ashbury Co. v. Riche*,² on the provisions of the Companies Act. The court, in construing that act, held that it prohibited the making of any contract not authorized by the memorandum of association. The American doctrine on this point is clearly stated by Mr. Justice Miller in *Thomas v. Railroad Co.*:³ "Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of the corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."⁴

Apart from statute, however, is there any illegality in an *ultra vires* act? The ordinary answer to this question is in the affirmative. *Ultra vires* contracts are unlawful and void, it is said, on account of "the interest of the public that the corporation shall

¹ *Ib.*; Morawetz, Corporations, § 648; George Wharton Pepper, 9 HARVARD LAW REVIEW, 255.

² L. R. 7 H. L. 653 (1875).

³ 101 U. S. 71 (1879).

⁴ *Ib.* 82.

not transcend the powers conferred upon it by law."¹ This doctrine has been so often reiterated by courts of the highest authority that it may seem presumptuous to question it. There are strong grounds, however, which cannot be set forth at length in this paper, for believing that the illegality of *ultra vires* acts, in every case where the act is not objectively illegal, may be shown to rest upon an express or implied statutory prohibition of such acts.² There is no stronger argument in support of this view than the different construction placed by the United States Supreme Court upon different provisions of the National Banking Act. A national bank is prohibited from lending money on real estate security, but a mortgage taken to secure such loans is enforceable.³ The bank is prohibited from transacting any business except such as is incidental and preliminary to its organization, until authorized by the comptroller of the currency. A lease made in violation of this provision is illegal and void.⁴ The same court has held, moreover, that the effect of an *ultra vires* act is a matter of statutory construction, in regard to which the federal courts are bound by the decisions of the supreme court of the state creating the corporation.⁵

On whatever grounds the illegality may rest, it is well settled that an *ultra vires* lease is illegal, and that no action can be brought upon the lease as a contract by either party.⁶ It is immaterial in this connection whether it is the lessor or the lessee that lacks corporate power to make the lease;⁷ although, if the lessee is a foreign corporation, the authorization of the lease by the legislature prevents either party from raising the question of its illegality.⁸ In some jurisdictions, however, if the lessee has

¹ *Central Transportation Co. v. Pullman Co.*, 139 U. S. 24, 48 (1891); *McCormick v. Market Bank*, 165 U. S. 538, 550 (1897); *De La Vergne Co. v. German Savings Institution*, 175 U. S. 40, 59 (1899).

² *Riche v. Ashbury Co.*, L. R. 9 Ex. 224, 264 (1874).

³ *National Bank v. Matthews*, 98 U. S. 621 (1878).

⁴ *McCormick v. Market Bank*, 165 U. S. 538 (1897).

⁵ *Sioux City R. Co. v. North American Trust Co.*, 173 U. S. 99, 112 (1899).

⁶ *Thomas v. Railroad Co.*, 101 U. S. 71 (1879); *Pennsylvania R. v. St. Louis, etc. R.*, 118 U. S. 290 (1886); *Oregon Railway & Navigation Co. v. Oregonian Railway Co.*, 130 U. S. 1 (1889); *Central Transportation Co. v. Pullman Co.*, 139 U. S. 24 (1891); *McCormick v. Market Bank*, 165 U. S. 538 (1897); *Brunswick Gaslight Co. v. United Gas Co.*, 85 Me. 532 (1893). "It has been uniformly held that there could be no recovery on the lease itself." *Brown, J.*, in *De La Vergne Co. v. German Savings Inst.*, 175 U. S. 40, 59 (1899).

⁷ *Pennsylvania R. Co. v. St. Louis, etc. R.*, 118 U. S. 290 (1886); *St. Louis, etc. R. Co. v. Terre Haute, etc. R. Co.*, 145 U. S. 393 (1892).

⁸ *Boston, Concord, etc. R. Co. v. Boston & L. R. Co.*, 65 N. H. 393 (1888).

occupied the premises under the lease he is liable for the rent.¹ This liability is said to rest upon estoppel. Such an application of the doctrine of estoppel has been often repudiated by the United States Supreme Court,² and there is a tendency to abandon it in some of the states where it previously prevailed.³ An analysis of the nature of estoppel shows clearly that the doctrine can have no application to *ultra vires* acts. Estoppel is analogous to contract. In contract, responsibility springs from the promise acted upon by the promisee. In estoppel, responsibility springs from the representation of fact acted upon by the party claiming the estoppel. If we take the position that the invalidity of an *ultra vires* act is due to lack of corporate capacity, we are confronted with the principle that estoppel cannot affect contractual capacity as determined by personal status.⁴ One who cannot be bound by a contract cannot be estopped from setting up the invalidity of that contract, as the cases of infants and married women show. On the other hand, if we regard an *ultra vires* act as illegal, we cannot escape the rule that there can be no estoppel against the law. If it is illegal for the corporation to do an *ultra vires* act, the act cannot be validated by the representation of the corporation itself. Instead of relying on an erroneous application of the doctrine of estoppel, it would be far more satisfactory if the courts which object to what Mr. Thompson,⁵ with unnecessary asperity, calls "the abominable doctrine of *ultra vires*," would simply say that the violation of the law by a corporation which exceeds its charter powers is an irrelevant issue except in a direct proceeding by the state against the corporation. Nevertheless, the supposed harshness of the rule making all *ultra vires* acts illegal has often induced courts to sustain the validity of such acts at the expense of strict logic. Such a result is an unsatisfactory compromise between the theory that *ultra vires* contracts are void for illegality, and the theory that the illegality of such contracts is irrelevant in actions between private persons. Any real hardship from the application of the strict rule of illegality may be obviated

¹ Camden, etc. R. v. May's Landing, etc. R., 48 N. J. 530 (1886); Corpus Christi v. Central Wharf Co., 8 Tex. Civ. App. 94; 27 S. W. 803 (1894); Heims Brewing Co. v. Flannery, 137 Ill. 309 (1891); Bath Gas Light Co. v. Claffy, 151 N. Y. 24 (1896).

² St. Louis, etc. R. v. Terre Haute, etc. R., 145 U. S. 393 (1892); and cases *supra*, note 6 on page 336, *supra*.

³ National Home Building Ass'n v. Bank, 181 Ill. 35 (1899).

⁴ Bigelow, Estoppel (5th ed.), 604, 605.

⁵ Corporations, vol. vii. § 8314 (1899).

by holding the officers of the corporation personally liable for breach of warranty of their authority to bind the corporation, as they have recently been held liable by the supreme court of Illinois in a case¹ where an *ultra vires* lease had been held void.

The lease being void for illegality, what remedy has the lessor if the lessee refuses to perform the covenants of the lease? Since the lessor has no contractual rights, he is to recover, if at all, against the lessee, upon equitable grounds; either on an implied assumpsit at law, or by filing a bill in equity for an accounting, as the case may be. There is a broad principle of equity, sometimes called the doctrine of unjust enrichment, that where one obtains property from another under a supposed contract, he cannot repudiate the contract and at the same time keep the property without paying anything for it. This quasi-contractual obligation on the part of the lessee to pay for what he has received under the lease, which in 1885 Mr. Justice Miller² said admitted of doubt, is now definitely established by the decision of the United States Supreme Court in the case of Pullman Co. v. Central Transportation Co.,³ rendered in 1898. There is only one possible objection to recovery by the lessor for the use and occupation of the property on quasi-contractual grounds, an objection which has been pointed out by Mr. Pepper.⁴

It is this:—That an *ultra vires* contract is illegal, and that the maxim *in pari delicto potior est conditio defendentis* must prevent a recovery, even for the benefits actually conferred. The effect of this maxim and the inconsistency displayed in its application are hereafter considered. Hitherto, only one court which has treated an *ultra vires* lease as illegal seems to have refused the lessor recovery on quasi-contractual grounds, merely on account of the illegality. The Supreme Court of Ohio in one case,⁵ it is true, held that there could be no recovery for the value of goods delivered under an *ultra vires* contract, but that was on the ground merely that the delivery was voluntary, with full knowledge of the facts. The Supreme Court of New York,⁶ however, in 1872, held that the maxim *in pari delicto* prevented a recovery by the lessor for use and occupation under an *ultra vires* lease. Such an application of the

¹ Seeberger v. McCormick, 178 Ill. 404 (1899).

² Pennsylvania Co. v. St. Louis, etc. R., 118 U. S. 318 (1898).

³ 171 U. S. 138 (1898).

⁴ 2 American Law Register, N. S. 299 (1865).

⁵ Railway Co. v. Iron Co., 46 Ohio St. 44 (1888).

⁶ Union Bridge Co. v. Troy, etc. R., 7 Lans. 240 (1872).

maxim is not without support in other cases of quasi-contractual actions ;¹ but the maxim is an arbitrary one, and the rule allowing a recovery on equitable grounds for benefits received under an *ultra vires* lease has the weight of reason, as well as of authority, in its favor.²

The very great importance of the difference between allowing recovery on the contract, and allowing recovery on the theory of quasi-contract, is shown by the case of Pullman Co. v. Central Transportation Co., already cited. The Central Co. had leased to the Pullman Co. for ninety-nine years its entire plant and personal property, together with its contracts and patents. For fifteen years the lessee carried out the terms of the lease. After that time the lessee refused to pay the rent, and set up that the lease was *ultra vires* on the part of the lessor. In an action brought to recover the rent, the defence of *ultra vires* was sustained, and the lease declared illegal and void. The lessee then filed a bill to enjoin the bringing of suits for the collection of rents, and the lessor filed a cross-bill for an accounting of what the lessee had received under the lease. The Supreme Court sustained the lessor's cross-bill in an opinion which shows clearly the grounds on which the lessor is allowed to recover. The lease in that case was of personalty which had substantially disappeared in use. The Supreme Court allowed the lessor to recover the value of the cars, etc., transferred under the lease, at the time of the repudiation of the lease by the lessee, together with the cash received under the lease by the lessee, and interest thereon from the time of the repudiation of the lease. No recovery was allowed for the contracts or patents, because they had expired by lapse of time before the repudiation of the lease ; nor for the use of the property transferred, or the earnings of such property in the hands of the lessee, because the rent paid prior to the repudiation of the lease was treated as full compensation for the use of the property under the lease. As millions were involved in this case, the decision as to the measure of recovery is of particular importance. The rule clearly established by the case is, that if the lease is of personalty, the lessor's right to recovery is limited to the value of the property transferred under the lease remaining in the hands of the lessee at the time the

¹ Peck v. Burr, 10 N. Y. 294 (1851).

² Farmers' Loan & Trust Co. v. St. Joseph, etc. R., 2 Fed. Rep. 117 (1880) ; Greenville Compress Co. v. Planters' Compress Co., 70 Miss. 669 (1893) ; Nashua, etc. R. v. Boston, etc. R., 164 Mass. 222 (1895) ; Manchester, etc. R. v. Concord R., 66 N. H. 100 (1890).

lease is repudiated; to which interest from that date must be added. The case does not decide what is the measure of recovery where the lease is of real estate. From the principles laid down in the opinion, however, and supported by other authorities, it seems that the lessor should recover from the lessee the value of the use and occupation of the land from the time of the repudiation of the lease.

It is commonly said that an *ultra vires* lease is void. That the lease is void as a contract, we have already seen. Is it also void as a conveyance? This question cannot be satisfactorily answered in the present state of the law. There are many decisions, but they cannot be harmonized. Two general principles governing *ultra vires* conveyances are fairly well established. One is that a conveyance of property is not subject to attack on the ground that the contract leading to the conveyance or contained in it is illegal.¹ This rule has often been applied to corporation cases in decisions holding that the right of the corporation to make or accept a conveyance under its charter is not a question which can affect the title to the property.² The act of the corporation in making or accepting the conveyance in violation of its charter simply subjects its charter to forfeiture. The second rule involves a limitation of the first. It is that in case property conveyed is subject to a public use, like a railroad, the conveyance is void on account of the injury to the public, unless the conveyance is sanctioned by the state.³

On principle, therefore, one might say that a corporate lease is valid as a conveyance, although *ultra vires*; unless the lease is of a railroad or other property burdened with any duties to the public, when it is void. The authorities, however, do not permit of such clear generalizations. We must inquire in every case whether any legal effect has been given to the lease by the courts.

The first question that naturally arises, assuming the lease to be void, is, How can the lessor regain possession of the property demised after the lessee has entered thereon? If the lease is void

¹ Brooks v. Martin, 2 Wall. 70 (1863); Planters' Bank v. Union Bank, 16 Wall. 483 (1872).

² Cowell v. Springs Co., 100 U. S. 55 (1879); Jones v. Habersham, 107 U. S. 174, 188 (1882); Fritts v. Palmer, 132 U. S. 282 (1889).

³ Thomas v. Railroad Co., 101 U. S. 83, Miller J.; Branch v. Jesup, 106 U. S. 478, Bradley, J.; Pennsylvania R. v. St. Louis, etc. R., 118 U. S. 290, Miller, J.; Central Transportation Co. v. Pullman Co., 139 U. S. 24, Gray, J.; Oregon R. v. Oregonian R., 130 U. S. 1, 23, Miller, J.; Snell v. Chicago, 152 U. S. 199, Brewer, J.; Brunswick Gaslight Co. v. United Gas Co., 85 Me. 532.

the lessor's rights are in no way affected by it. Therefore the lessor still has both right of property and right of possession. It would seem, therefore, that the lessor might regain possession of the property by the simple process of reëntry. This was the position taken by the lessor in the case of the American Union Telegraph Co. *v.* Union Pacific Railroad Co.¹ In that case the lessor, a railroad company, had made an *ultra vires* lease of its telegraph lines to the telegraph company, for which it received value. Fourteen years afterward the lessor undertook to rescind the lease on its own motion and to resume possession and control of the property, on the theory that the lease was void. The Circuit Court, McCrary, J., enjoined this action of the lessor. The court admitted the right of the lessor to rescind the lease, but said: "The right of rescission does not justify the railroad company in taking possession except by lawful means. A party who is in actual possession of the property, claiming under color of title, is not to be ousted except by means provided by law, and such possession the court will protect by injunction from disturbance by any other means." The lessor was given leave to file a cross-bill tendering a return of the consideration and praying for a cancellation of the lease. In other cases² involving the same questions, the lessor was enjoined from interfering with the lessee, because the latter had expended money on the property, so that the court regarded the lessor and the lessee as joint owners. These cases support the view that an *ultra vires* lease of property burdened with public duties is not absolutely void because *ultra vires*, but gives the lessee who enters under it a right of possession which can only be taken away by proper legal proceedings. On the other hand, where the lessor had taken possession of the property, and had filed a bill for the rescission of the lease, Foster, J.,³ refused to dissolve an injunction which the lessor had obtained against the lessee's interference with the property. To reconcile the decision of Judge Foster with that of Judge McCrary is a difficult task.

Again, in a Tennessee case, *Mallory v. The Hanaur Oil Works*,⁴ decided in 1888, there was an *ultra vires* contract by which four

¹ 1 McCrary, 188 (1880).

² *Western Union Tel. Co. v. Union Pacific R.*, 1 McCrary, 558 (1880); *Western Union Tel. Co. v. Burlington, etc. R.*, 3 McCrary, 130 (1882). See, also, 1 McCrary, 581.

³ *Central Branch U. P. R. v. Western Union Tel. Co.*, 1 McCrary, 551 (1880).

⁴ 86 Tenn. 598.

corporations turned over to certain trustees for three years all their property. One of the corporations subsequently repudiated the agreement and brought an action of unlawful detainer. The court held the agreement to be *ultra vires*, and restored the property to the plaintiff. On general principles it would seem that if an action of unlawful detainer can be sustained by the lessor, a right of reëntry, at least by peaceable means, is to be implied. It is to be noted that in the Tennessee case the lease was made by an ordinary business corporation, so that, on principle, one might expect it to be upheld; while in the case of the Telegraph Co. above cited the lease was a conveyance of property burdened with public duties, which, on principle, might be regarded as absolutely void.

Although the courts are likely to deny to the lessor the right to recover property demised by its own act, the statement has often been made, as in the case of the Telegraph Co. above cited, that the courts will restore to the lessor the property demised by an *ultra vires* lease. As in the case of the Telegraph Co. the lessor was given leave to file a cross-bill tendering a return of the consideration and praying for a cancellation of the lease, so in the case of the Memphis and Charleston Railroad Co. *v.* Grayson,¹ decided by the Supreme Court of Alabama in 1890, the right of the lessor to file a bill for the cancellation of the lease was distinctly upheld. Even Mr. Justice Gray, who has since taken the strongest ground against relieving the lessor from an *ultra vires* lease, said in 1890, in the case of the Central Transportation Co. *v.* Pullman Co.: "The courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting *property or money*, parted with on the faith of the unlawful contract, *to be recovered back*."² Other language by eminent judges might be quoted in support of this view. Mr. Justice Miller said in 1886: "The courts have gone a long way to enable parties, who had parted with property or money on the faith of such contracts, to obtain justice by recovery of the property or the money specifically."³ So in the case of Pullman Co. *v.* Central Transportation Co., Mr. Justice Peckham, speaking of the liability of the lessee for property received under an *ultra vires* lease, said that such "liability is based only upon an implied promise to *return* or make compensation therefor. This implication of a promise would not arise until *one or the other party* chose to terminate the lease."⁴

¹ 88 Ala. 570.

² 139 U. S. 24, 60.

³ Salt Lake City *v.* Hollister, 118 U. S. 263.

⁴ 171 U. S. 138, 159 (1898).

In the case of *ultra vires* leases of railroad companies and other similar corporations, there is high authority for saying that there is not only a right on the part of the lessor to claim rescission of the lease, but a positive duty. In the well-known case of *Thomas v. Railroad Co.*,¹ decided by the United States Supreme Court in the October term, 1879, a railroad company had made an *ultra vires* lease of its road to another company. The lessor resumed possession of the property before the expiration of the lease, and the lessee brought an action for damages on account of the refusal of the lessor to arbitrate as to the value of the unexpired term of the lease. The lease contained a provision for arbitration in case of resumption of possession by the lessor. The Supreme Court of the United States, in an opinion by Mr. Justice Miller, held that the contract sued upon was forbidden by public policy. "Having entered into the agreement," says Justice Miller, "it is the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it." This statement of Mr. Justice Miller's was *obiter dictum*, but has often been cited with approval.

The positive language used in this case was reiterated by the same judge in 1886 in the case of the *Pennsylvania Co. v. St. Louis, etc. Railroad Co.*² Mr. Justice Miller's opinion on this point has often been quoted,³ and seems to have been generally accepted as a correct statement of the law; and in the latest book on corporations, the seventh volume of Mr. Thompson's Commentaries,⁴ published in 1899, the continuing duty of rescission by the lessor, in the case of an *ultra vires* lease by a so-called public corporation, is emphatically set forth. The reason for this doctrine is obvious. If the lease is void because it is injurious to the public interest, then the public interest is best promoted by a rescission of the lease; which the lessor ought to seek, and which the courts, of course, ought to grant. This apparently reasonable doctrine, however, has been rejected by the Supreme Court of the United States. In the case of the *St. Louis, etc. Railroad Co. v. Terre Haute, etc. Railroad Co.*,⁵ decided in 1892, the plaintiff had leased its railroad to the defendant for nine hundred and ninety-nine years. The lessee had been in possession, paying the stipulated rent for seventeen years without taking any steps to rescind the lease, when the lessor filed a bill for the cancellation of the lease and the restoration of the

¹ 101 U. S. 71.

² 118 U. S. 290, 317.

³ As in *Newcastle Northern R. v. Simpson*, 21 Fed. Rep. 533 (1884).

⁴ § 8331.

⁵ 145 U. S. 393 (1892).

property, on the ground that the lease was illegal and that the parties were *in pari delicto*. The reasoning of Mr. Justice Miller proved insufficient to overcome the force of the maxim, *in pari delicto potior est conditio defendentis*. Now, whatever may be the value of legal maxims, they cannot be accepted as the safest premises from which to draw conclusions. A legal maxim is always a generalization and is usually expressed in a more or less attractive form. Unfortunately, our law is made up of particular cases from which generalizations can only be drawn with the greatest care. The more glittering the generalization, therefore, the greater the probability of its inaccuracy. Wise saws are good companions, but poor substitutes for modern instances. Of all the legal maxims which have confused instead of simplifying the law, there is none more troublesome than this old saw, *in pari delicto potior est conditio defendentis*. The general meaning of the maxim is clear. Not only will a court refuse to enforce an illegal contract, but it will also take into account the illegal conduct of the parties when either appeals for any relief in connection with the illegal transaction, and if it sees fit, will leave the parties where it finds them. In many cases, of course, this is sound public policy, but we have never been able to reach any satisfactory and consistent conclusions as to the extent to which this maxim should be applied. There is one qualification in the maxim itself — it does not apply unless the parties are *in pari delicto*. Therefore, if one party is induced by the fraud or duress of the other to enter into an illegal contract, his case is not affected by the maxim.¹ In a New Hampshire case, decided in 1890, Manchester, etc. Co. v. Concord Railroad Co.,² the court held that a railroad company which had leased its road to another was not *in pari delicto* with the lessee company. In the case of the St. Louis Railroad v. Terre Haute Railroad, the United States Supreme Court held that the lessor and the lessee companies were *in pari delicto*. It is difficult to understand the reasoning of the New Hampshire court in this regard, or to see how there can be any legal difference in the iniquity of the lessor and the lessee companies. Certainly the United States Supreme Court has shown no disposition to weigh the respective demerits of the parties to an *ultra vires* railway lease.

Another limitation upon the maxim *in pari delicto* has been suggested by Mr. Keener,³ who says that "if the illegality is *malum prohibitum* merely, the plaintiff can, so long as the contract

¹ 145 U. S. 407 (1892).

² 66 N. H. 100

³ Quasi-Contracts, 259.

remains executory, disaffirm the contract and recover the money paid or property delivered thereunder." This exception is also upheld by Mr. Pepper.¹ The exception, however, is of uncertain authority and of more uncertain application. According to Sir William Anson,² the law cannot be said to be satisfactorily settled on this point. He and Mr. Leake³ agree that where the illegal contract has been partly performed, the maxim *in pari delicto* applies, and there is American authority to the same effect.⁴ Mr. Keener and Mr. Pepper, however, appear to take the opposite view. The whole trouble, both in regard to the maxim and in regard to the exception, springs from one source. In considering the question of illegality as affecting the rights of the parties to a given case, the object of the court is to protect the public interest. Its inquiry, therefore, ought to be, what method of dealing with the present situation will best tend to prevent the injurious results to the public which are supposed to flow from every illegal transaction. In many cases, if the court were to grant rescission of the transaction, it would interpose the most effective barrier against the consequences of the illegal act. There is excellent authority for saying that the decisions of the courts in reference to such illegal transactions, where the question does not arise on the illegal contract itself, should be determined by the practical consequences of the decision.⁵ Mr. Justice Story,⁶ in discussing the maxim *in pari delicto*, says: "But in cases where the agreements or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is *particeps criminis* is not in equity material. The reason is that the public interest requires that relief should be given, and it is given to the public through the party." This reasoning of Mr. Justice Story was deemed conclusive by the Supreme Court of New York,⁷ and is not answered by the opinion in *St. Louis Railroad v. Terre Haute Railroad*.⁸ A Texas court, in following that opinion, answers Story's statement of the law by

¹ 9 HARVARD LAW REV. 257; 2 AMERICAN LAW REG. (N. S.) 296.

² Contracts (8th ed.), 217.

³ Digest of Contracts, 673.

⁴ Singer Mfg. Co. v. Draper, 52 S. W. 879, Tenn. (1899).

⁵ Block v. Darling, 140 U. S. 234 (1891); New Castle Northern R. v. Simpson, 21 Fed. Rep. 533, 537 (1884); Tate v. Commercial B'l'd'g Ass'n, 33 S. E. 382 (1899), Va.; Story, Equity Jur. § 298.

⁶ Equity Jur. § 298.

⁷ Union Bridge Co. v. Troy, etc. R., 7 Lans. 240 (1872).

⁸ 145 U. S. 393.

saying: "Where the plaintiffs' conduct should preclude them from attacking such a transaction for their private advantage, they should not be allowed to represent the public interests which they have sacrificed, and to determine for themselves when and how they should be set up. Here the illegal thing consists in the parting with the control of the road."¹ This answer is unsatisfactory. The illegality of the lessor's conduct consists not merely in parting with the control of the road, but in its continual refusal to perform its duties to the public, and the attempt of the lessor to resume the performance of its duties is one which the courts would naturally be expected to encourage. The fact is, altogether too much importance has been attached to the arbitrary maxim *in pari delicto*. The courts, in striving to avoid the consequences of that maxim by making exceptions thereto, often avoid the Scylla of injustice only to wreck their legal theories on the Charybdis of inconsistency. The trouble is that, in attempting to protect the public interest, the courts have attempted to draw distinctions with reference to the previous conduct of the parties, instead of with reference to the probable or natural effect of the decree asked for upon the public welfare, and such distinctions have proved impossible of satisfactory or consistent application. The more extensive the comparison of the cases in which the maxim *in pari delicto* has been applied,² the clearer becomes the impossibility, in this country at least, of reaching any satisfactory general conclusions from the maxim. Thus, it is generally understood that in a case where the maxim *in pari delicto* applies, there can be no recovery for benefits conferred on the theory of an implied contract.³ In the case of an *ultra vires* lease, the maxim *in pari delicto*, according to the decisions of the United States Supreme Court, will prevent a decree of rescission, even of the executory portion of the lease, so long as the lessee does not violate the provisions of the lease; but the maxim does not prevent a recovery on quasi-contractual grounds for the use and occupation of the premises under the lease,—an inconsistency which was pointed out some years ago by Mr. Pepper.⁴ It is a poor maxim, however, that does not

¹ *Olcott v. International, etc. R.*, 28 S. W. 728 (1894), Tex. Civ. App.

² *Cf. Brooks v. Martin*, 2 Wall. 70; *Planters' Bank v. Union Bank*, 16 Wall. 483; *Block v. Darling*, 140 U. S. 234; *Spring Co. v. Knowlton*, 103 U. S. 49; *Herman v. Jeuchner*, 15 Q. B. D. 561; *Re Great Berlin Stbt. Co.*, 26 C. D. 616; *Kearley v. Thompson*, 24 Q. B. D. 742; *Kirkpatrick v. Clark*, 132 Ill. 342; *St. Louis, etc. R. v. Terre Haute, etc. R.*, 145 U. S. 393; *Union Bridge Co. v. Troy, etc. R.*, 7 Lans. 240.

³ 2 American Law Reg. (N. S.) 306.

⁴ *Ib.* 296.

work both ways ; and this same maxim led the Supreme Court of New York¹ to exactly the opposite conclusion, namely, that the court ought to rescind the lease upon the application of the lessor, but that it ought to award the lessor no compensation for the use and occupation of its property. Both these opposite conclusions are entitled to respect ; but they do not increase one's respect for the arbitrary maxim on which both are founded ; and they show clearly the necessity of some restatement of the law as to the effect of the illegality of a contract on other legal relations of the parties to that contract.

The maxim *in pari delicto* is not in any case a bar to the equitable rescission of the lease as against stockholders in the lessor corporation who have not assented to or ratified the lease. Any *ultra vires* act of the corporation is an infringement of the equitable rights of the non-assenting stockholders. A corporation may sue to rescind such act, as the representative of the injured stockholders,² and if it refuses to sue, such stockholders may file a stockholders' bill for rescission,³ making the corporation a party defendant. If, however, the rights of the dissenting stockholders are barred by laches or any other defence, neither they nor the corporation can file a bill for rescission ;⁴ unless the corporation itself is given that right on grounds of public policy.⁵ The maxim *in pari delicto* does not, it seems, prevent rescission of the contract in any case where the corporation sues in a representative capacity, as in the case of the trustees of a charitable fund,⁶ or in the case of a municipal corporation.⁷

If a court will not entertain a bill in equity for the rescission of an *ultra vires* lease, it is probable that it will also refuse to entertain an action at law for the recovery of the property. This does not necessarily follow, however. The maxim *in pari delicto* operates as a bar to the plaintiff's recovery, it is commonly said, only where the plaintiff is compelled to establish his case by proving that he himself has acted illegally. In the case of a bill in equity

¹ Union Bridge Co. v. Troy, etc. R., 7 Lans. 240 (1872).

² Great Northwestern Central R. v. Charlebois, 1899, A. C. 114 (P. C.) ; Olcott v. International, etc. R., 28 S. W. 728 (1894), Tex. Civ. App.

³ Board of Commissioners v. Lafayette, etc. R., 50 Ind. 85 (1875).

⁴ St. Louis, etc. R. v. Terre Haute, etc. R., 145 U. S., 393 (1892) ; Boston, Concord, etc. R. v. Boston & Lowell R., 65 N. H. 393 (1888) ; Olcott v. International, etc. R., 28 S. W. 728 (1894), Tex. Civ. App.

⁵ Memphis, etc. R. v. Grayson, 88 Ala. 570 (1890).

⁶ Auburn Academy v. Strong, Hopk. Ch. 278 (1824).

⁷ Detroit v. Detroit City R., 56 Fed. Rep. 868, 892 (1893).

to rescind an *ultra vires* lease, the illegality must appear in the bill itself. If, however, the lessor brings an action of ejectment, or of forcible entry, against the lessee, it seems unnecessary for the plaintiff to offer the lease in evidence. The plaintiff is not seeking to recover on the lease, but on the ground of ownership of the property to which the lessee has no title or right of possession. If, then, the plaintiff establishes his ownership and the defendant's ouster, the plaintiff has made a *prima facie* case. If the *ultra vires* lease is treated as a valid conveyance, it is, of course, a sufficient defense to the lessee; but if the lease be held void as a conveyance, the only ground on which it is admissible as evidence for defendant is that public policy requires the admission of the lease in order to prevent the wicked plaintiff from obtaining any assistance from the courts. Unless the lease should be unnecessarily introduced in evidence by the plaintiff, the plaintiff's case does not rest upon the illegal lease, and he might perhaps recover in spite of the maxim *in pari delicto*. Recovery in an action at law for unlawful detainer has been allowed the lessor in Tennessee.¹ A Texas court, however, has held that the lessee may set up the illegality of the lease as a defence, even though the lessor is able to make a *prima facie* case without showing any illegality in the transaction.² Mr. Justice Gray, in *St. Louis Railroad v. Terre Haute Railroad*,³ said that where the lessee does not repudiate the lease, the case is one in which "the court will not disturb the possession of the property that has passed under the contract, but will refuse to interfere as the matter stands."⁴ On the other hand, in the later case of *Pullman Co. v. Transportation Co.*,⁵ Mr. Justice Peckham said that "the use of the property is lawful as between the parties so long as the lease was not repudiated by either,"⁶ implying that the lessor as well as the lessee had a right to repudiate the lease. All that the case of *St. Louis Railroad v. Terre Haute Railroad* decides is that a court of equity will not grant relief to the lessor so long as the lessee does not repudiate the lease. The right of the lessor to repudiate the lease and assert his original rights in a court of law has not yet been determined by the Supreme Court of the United States; although Mr. Justice Gray's opinion is opposed to the recognition of such a right. Whether the lessor can rescind the lease or not, it seems that in *quo warranto* proceedings by the

¹ *Mallory v. Hanaur Oil Works*, 86 Tenn. 598 (1888).

² *Olcott v. International, etc. R.*, 28 S. W. 728 (1894), Tex. Civ. App.

³ 145 U. S. 393.

⁴ *Ib.* 409.

⁵ 171 U. S. 138.

⁶ *Ib.* 160.

state, the lease may be declared void;¹ and the making of the lease has been held an offence so grave as to warrant the forfeiture of the corporation charter.²

What has been said previously with reference to the recovery of the demised property by the lessor refers only to the case where the lessor seeks to repudiate the lease. We have now to consider the result where the lease is terminated by lapse of time or by breach of condition. It is probable that the lessor has the same right to recover the property upon the termination of an *ultra vires* lease, or upon a breach of condition of such lease by the lessee, that it would have if the lease were valid. In a case in the Supreme Court of Washington, *Hall, etc. Co. v. Wilber*,³ decided in 1892, the lessor brought an action for unlawful detainer against the lessee, who had refused to pay his rent. The complaint set out the lease, and lack of corporate power in the lessor to make the lease was held to be no defence to the action. The Supreme Court of the United States, in the case of *St. Louis Railroad v. Terre Haute Railroad*,⁴ clearly intimated that the recovery of the property, which was refused the lessor in that case, would be allowed if the lessee repudiated the lease. So, in the case of *Pullman Co. v. Transportation Co.*,⁵ Mr. Justice Peckham's statement that the use of the property was lawful as between the parties so long as the lease was not repudiated by either, implies that upon breach of condition by the lessee such use would become unlawful. On the other hand, there is a case decided by the Circuit Court of Appeals for the sixth circuit,⁶ involving an application of the maxim *in pari delicto* which it is difficult to reconcile with any of the other cases. In that case, the Merz Capsule Company had entered into an *ultra vires* contract. In pursuance of this contract, this company conveyed its property to the United States Capsule Company, taking back a lease of the premises for a few weeks. After the expiration of the lease the lessee continued in possession, and refused to surrender possession to the lessor, at the same time tendering back what it had received from the lessor, and demanding complete rescission. The lessor thereupon entered upon the premises and undertook to

¹ *State v. Atchison, etc. R.*, 24 Neb. 143 (1888).

² *Eel River R. v. State*, 57 N. E. 388 (1900), Ind.

³ 4 Wash. 644.

⁴ 145 U. S. 393.

⁵ 171 U. S. 138.

⁶ *McCutcheon v. Merz Capsule Co.*, 37 U. S. App. 586 (1896).

remove the machinery, and the lessee filed a bill praying that the *ultra vires* contracts and conveyances should be cancelled, and the lessor enjoined from interfering with the lessee's possession. The lessor filed a cross-bill, setting up the instruments in question as legal instruments, and praying for specific performance of the agreements therein contained. The cross-bill was dismissed and a decree entered under the original bill, quieting title in the lessee, and enjoining the lessor from the commission of trespass. This decree was affirmed by the Circuit Court of Appeals. The court quoted the language of Mr. Justice Gray in *St. Louis Railroad v. Terre Haute Railroad*:¹ "If the contract is illegal, affirmative relief against it will not be granted at law or in equity unless the contract remains executory." The court went on to say: "The contract in the case at bar between parties *in pari delicto* is in a large degree still executory." Now, in the case of *St. Louis Railroad v. Terre Haute Railroad*, only seventeen years of the nine hundred and ninety-nine year lease had elapsed, yet the Supreme Court refused the lessor rescission as to the remaining part of the term. In the case of *McCutcheon v. Capsule Co.*, the complainant had in the first place executed a deed to the defendant, which, according to the decisions of the Supreme Court, transferred the title to the property to the defendant, and had also taken back a lease from the defendant, which had expired. Yet after all this had been done, the court held that the transaction was so far *executory* as to entitle the complainant to relief, in spite of the maxim *in pari delicto*.

A few points with reference to the effect of an *ultra vires* lease upon the rights of third parties remain to be mentioned. One rule well established is that the lease cannot relieve the lessor corporation of any duties imposed upon it by law; so that a railroad company, leasing its road without legislative sanction, remains responsible for the proper operation of the road.² Another rule is that the invalidity of the lease does not affect any obligation assumed by the lessee, as carrier, warehouseman, or other bailee.³ Another possible collateral effect of the doctrine of *ultra vires* is shown in the case of *Great Northern Railroad v. Eastern Counties Railroad*.⁴ The plaintiff in that case had an agreement

¹ 145 U.S. 393.

² *Railroad Co. v. Brown*, 17 Wall. 445, 450 (1873); 7 Am. & Eng. Encyc. of Law (2d ed.), 747.

³ *McCluer v. Manchester, etc. R.*, 13 Gray, 124 (1859).

⁴ 9 Hare, 306 (1851).

with the defendant by which the defendant allowed the use of its lines to connect plaintiff's lines with those of a third railroad, which had been practically leased by the plaintiff under an *ultra vires* agreement. The plaintiff sought an injunction to prevent the defendant from interfering with the free passage of the plaintiff over the defendant's lines to the leased railroad. The court refused the injunction on grounds of public policy.

The results of the foregoing examination of the authorities may be summed up as follows:—

1. The lease as a contract is void, and no action can be brought upon it; except in those jurisdictions where the defence of *ultra vires* is excluded in actions on contracts fully or partially executed, on the alleged ground of estoppel.

2. The lessor is entitled to compensation for the use of its property under the lease, the amount of such compensation being determined by equitable principles.

3. An *ultra vires* lease by an ordinary business corporation, to which all the stockholders assent, may be upheld on general principles as a valid conveyance of the property; but the law is uncertain.

4. An *ultra vires* lease of a railroad, or other property burdened with duties to the public, on principle might be regarded as void. So far as the obligations of the lessor to the public are concerned, the lessor is relieved of no obligation by the lease; but as between the lessor and the lessee, the relative rights of the parties cannot at present be clearly defined, on account of the uncertainty as to the application of the maxim *in pari delicto*, and of the greater uncertainty whither the courts will be carried by public policy—once called an unruly horse, but at the present day displaying the even more unruly disposition of an automobile. It seems, however, that the lessor may not forcibly dispossess the lessee; and it is uncertain, in the federal courts, at least, whether the lessor has any remedy for the recovery of the property, so long as the lessee observes the conditions of the lease.

5. If there is a breach of condition of the lease, as in the case of repudiation by the lessee, the lessor seems to have the same right to recover the property that it would have in the case of a breach of condition in a valid lease.

There are two theories with reference to the nature of law, each upheld by able advocates. One is that the law is a collection of principles which are illustrated by the decisions of the courts. The other is that law is a natural science; and that its principles

are to be ascertained by studying the actions of courts, as the principles of physiology are ascertained by studying the action of living organisms. Whether one regards judicial decisions as the foundation of legal principles, or as mere illustrations of those principles, it must be conceded that the law of corporations at the present time suffers from an embarrassment of riches. We have more "principles" and more decisions than we can harmonize into a system of corporation law. The conflict of opinion and of authority on one question only has been shown in this paper. That conflict will necessarily continue during the formative period of corporation law, until, by the survival of the fittest, harmony of theories and decisions is obtained, and the law of corporations, following the example of the law of real property, becomes crystallized into a system of fixed rules, alterable only by legislation.

Edward Avery Harriman.

CHICAGO.

FROM JOHN AUSTIN TO JOHN C. HURD.

A FEW WORDS ON THE NATURE AND LIMITATIONS OF POLITICAL SOVEREIGNTY — ESPECIALLY WITH REFERENCE TO THE UNITED STATES.

BETWEEN the lives of John Austin and John C. Hurd — whose associated names give the heading to this paper — there is a certain interesting parallelism. Hurd, the American, like Austin, the Englishman, was educated for the bar, possessed high legal attainments, but was never able sufficiently to master his peculiarities of temperament to practise his profession. He was graduated from Yale in 1836, passed his early manhood in study and travel, and in 1858 published his first book, *The Law of Freedom and Bondage* — a juristical treatise suggested by the existence of slavery in the United States. The book met with appreciation from scholars, but won no favor with the general public; and it was not until 1878, twenty years later, and while Mr. Hurd was absent in Japan, that Yale College, awakening to the genius of her author-graduate, conferred upon him the degree of Doctor of Laws. In 1881 Mr. Hurd published his second book, the most important of his life, entitled *The Theory of our National Existence*. This work, like its predecessor, was accorded no general recognition, and in so far as recognized at all was misunderstood. In sheer desperation at his ill luck in making himself intelligible, Mr. Hurd in 1888 printed anonymously a little volume entitled *The Century of a Revolution*, in which he sought in rough and ready phrase to gain at least the ear of American readers. His final word was uttered in a scholarly and temperate pamphlet, *The Union State*, printed in 1890, just two years before his death.

As a result of the reading of *The Theory of Our National Existence*, a copy of which I chanced one day to pick up in the library of the Iowa State University, I wrote to Mr. Hurd, and soon received a reply in which he said: "It is most gratifying to me to learn that I have one more reader for *The Theory*. I should perhaps say one reader who will speak of reading it 'with much intellectual stimulus and pleasure.' As to your main inquiry, 'to what extent Mr. Hurd's views have gained acceptance in this

country,' I can say most decidedly that the views which I intended to set forth have not, so far as I know, been accepted by any one." Having occasion to go East in 1889, I sought out Mr. Hurd. I found him living quietly in Boston, a stately gray-haired man, of the fine old school of manners in which Austin himself had been bred, kind-hearted and surrounded by well beloved books. He was careful to give no outward sign, but I suspect that there were hours when he felt that he was intellectually out of touch with his generation — that he, like Austin, had been born, so to speak, "out of time and place."

But the parallelism between Austin and Hurd, with which it is proposed here to concern ourselves, is one of ideas and not of personal history. Both men dealt with the subject of political sovereignty, its nature and limitations. They dealt with the subject, moreover, from the same point of view and in the light of principles which they equally accepted: the former proceeding deductively and applying the results of his thinking to political societies in general; and the latter, rather by inductive processes, applying the results to the solution of the question, Where is the seat of political sovereignty in the United States of America? Austin in his lecture VI., delivered prior to 1832 and entitled by one of his editors *Independent Society*, had suggested a particular solution; and Hurd, writing in 1881, seized upon this and developed it into a complete and consistent explanation of the many points regarding the nature of our federal system which vexed, harassed, and fairly overwhelmed our statesmen, courts, and publicists during the period of the Civil War and Reconstruction.¹

The views held by Austin concerning political sovereignty, and the relation of the latter to positive law, are set forth by him in a series of terse, pregnant propositions constituting, when taken together, a single comprehensive definition which, although so worn by use as to be threadbare, it will nevertheless be desirable to repeat: —

(1) "If a determinate human superior," says Austin, "not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sov-

¹ In 1864 Mr. Orestes A. Brownson published a series of articles in his *Quarterly Review*, setting forth ideas substantially identical with those of Mr. Hurd. As Mr. Brownson frankly states, however, these ideas were derived from Mr. Hurd's first book, *The Law of Freedom and Bondage*, in which (at chapter xi.) the author anticipates the conclusions presented in detail in *The Theory of Our National Existence*. Mr. Brownson's articles were afterwards gathered into a volume entitled *The American Republic*, and this work is much quoted and referred to by Mr. Hurd.

ereign in that society, and the society—including the superior—is a society political and independent.” And again:—

(2) “Every positive law is set directly or circuitously by a monarch, or sovereign number, to a person or persons in a state of subjection to its author.” And lastly:—

(3) “The power of a monarch properly so called, or the power of a sovereign number, in its collegiate and sovereign capacity, is incapable of legal limitation.”

“But what of it all, anyway?” somebody may ask. “Suppose Austin’s definition to be substantially correct, is not the whole dispute one more about words than things—one far more academical and scholastic than practical? ‘The general fabric of rights in any society,’ Professor T. H. Green, says, ‘does not depend on the existence of a definite and ascertained sovereignty, . . . on the determination of a person or persons in whom supreme power resides;’ hence what essential or even important difference does it make to anybody whether political sovereignty be—as is maintained by Professor D. G. Ritchie and Mr. W. S. M’Kechie—in the General Will, or—as is maintained by Professors Henry Sidgwick and A. V. Dicey—in determinate persons; whether—as is maintained by Mr. W. W. Willoughby and the former—sovereignty be a unit, or—as is maintained by Mr. A. Lawrence Lowell and the latter—it be divisible into parts?” The answering of this question brings us directly to the United States of America and to Mr. John C. Hurd; for the determination of the location and nature of the political sovereign in a federal community like the United States, as undertaken by Mr. Hurd, affords one of the best and most interesting tests of the value in political science of the abstract definition by Austin. That is to say, it affords one of the best tests of the value of Austin’s definition in settling such questions as the following: Are the states in the American Union mere administrative departments of the federal government? and if not, how can they be discriminated therefrom? Has it from the first been permissible for a state of the Union to abjure its political existence? if so, when the Southern States attempted to secede in 1861, did they not merely abjure their statehood, thus becoming dependencies or territories? Can treason be committed against the United States by individuals who are citizens of states attempting to secede from the Union, if we hold to the doctrine of an indestructible union of indestructible states? Has the progress of time and events changed the fundamental character of the American Union? if so, was the change

effected at the time of the adoption of the federal Constitution, or was it only effected at the close, and as a result, of the Civil War? If the original union of the states remains as yet practically unchanged, what acts on the part of the federal government would indicate any drift of purpose toward procuring a change therein? What is the true position of the Supreme Court of the United States in the American Union, — is it in any sense a political arbiter for the Union? When a political party, such as the Democratic party in the United States, declares for the preservation of the rights of the states, what clear ideas as to such rights ought it to be possible to enunciate?

Austin, lecturing prior to the year 1832, and himself applying to the United States the various requirements of his abstract definition of political sovereignty, — namely, (1) that the sovereign must be a political superior not in the habit of habitual obedience to a like superior; (2) that he, or it, must be some determinate person or persons; and (3) that he, or it, must be incapable of legal limitation, — discovers the political sovereign in the United States to be the states taken collectively. To the states taken collectively — the states in union — each individual state is subject. In other words, according to Austin, the American political sovereign is an oligarchical body, but the members of this body are states instead of individuals. The states, as purely political organizations, however, consist in their respective electorates. Consequently, when the political sovereign is spoken of as an oligarchy of states, what precisely is meant is that the sovereign is the electorates of the various states acting together.¹ In commenting upon the passages from Austin which are summarized in the foregoing statement, Professor T. H. Green says that "it required all Austin's subtilty to detect where sovereignty lay in the United States, and that he places it where no ordinary citizen of the country has ever thought of it as residing."

There is truth in Professor Green's intimation that but few Americans have ever conceived of the political sovereign here as consisting in the states in union, the collective states, but foremost among those who have thus conceived of the sovereign stands Mr. Hurd. Indeed, it is by no means improbable that the latter had worked out this conception independently of Austin. At all events, as already stated, Mr. Hurd seized upon the conception, and by the matchless skill of his application of it in detail,

¹ *Province of Jurisprudence Determined* (Campbell's ed. 1875), p. 147.

made it peculiarly his own. To begin with, Mr. Hurd points out that it is the necessity for finding in the United States a political superior which is determinate in some particular persons, that makes it clear that the states collectively are the sovereign; for the only persons invested with ultimate political power that have ever existed in the American Union — whether before the adoption of the federal Constitution or afterwards — are the electoral bodies in the various states acting in union. Thus it is absolutely indisputable as a matter of fact — and so recognized to be by publicists of the views of Kent and Story as well as by those of the views of Jefferson and Calhoun — that no law has ever been enacted or act passed within the limits of the United States excepting by delegates or representatives chosen by the electoral bodies in the several states voting separately and according to their own state laws determining the individual voters.¹ And it is equally clear, Mr. Hurd explains, although not so undisputed, that the states have never in the whole course of their history taken sovereign action of any sort save collectively — save in union.² It matters

¹ "No doubt can emerge as to who the people of each colony were, any more than now as to who the people of each state are. They originally were, and still are, the body of voters or electors composing each state, the only body from which in our system any authority of a public or political nature was ever derived. Nothing is more fundamental, or of greater importance, in our system, than a clear understanding of the simple facts that the sovereign, supreme, and uncontrollable authority always resides in the body of voters or electors composing the political state, . . . and that there always were as many . . . bodies of electors as there were states in the Union. These electors are in fact the absolute sovereigns; there is no restriction of their power but their Constitution, and this they change at their pleasure." . . . "Those who attempt to maintain that the people of the United States have a history, as composing one political body, ought to show us an instance of an election at which some one elector, at least, voted under and by virtue of the law of that political body." William O. Bateman, *Political and Constitutional Law of the United States* (1876), pp. 33-4.

It is most extraordinary that Kent, Story, and Webster could insist that facts such as those recited by Mr. Bateman did not negative their contention that the American people existed as one political body. Such insistence is only explicable on the supposition that it was hoped thereby to overthrow the doctrine of state sovereignty, and that it was not deemed possible to overthrow this doctrine otherwise. Whether Mr. Hurd's view, had it been formulated at this period, would have been conceded by Kent, Story, and Webster to furnish a better weapon for the overthrow of "state sovereignty" is an interesting question.

² "There was no period when England or France, for instance, could have opened negotiations with any one of the thirteen states, as with one of the recognized nations of the world. There was but one new nation added to the family of nations as the result of the Revolutionary War." John C. Ropes, *Harvard Monthly* for May, 1887, p. 91.

"It is evident that the states, though declared to be sovereign and independent, were never strictly so in their individual character; but that they were always; in

not that, in the old Articles of Confederation or elsewhere, the states are declared to be severally sovereign; sovereignty is a question of fact to be settled not by what is said but by what is done, and according to this test, the states have never been sovereign otherwise than collectively or in union. Corollary to this main conclusion are two others emphasized by Mr. Hurd: first, that the general or federal government at Washington, in its three branches, legislative, executive, and judicial, being maintained in existence only by the voluntary action of the collective states in sending representatives and in choosing presidential electors, may at any time be caused to go out of existence through refusal, on the part of the states acting in union, to keep up its personnel;¹ such a course being one purely political in character, and uncontrolled and uncontrollable against the will of the collective states as sovereign, by the general government as agent; second, that any single state may abjure its political existence — its existence as one of the oligarchy of states constituting the Union — by refusal or failure to choose representatives and presidential electors, and thus pass into the condition of a dependency or territory ruled by the collective states — the states remaining in union;² just as a natural person, member of a sovereign corporation, may withdraw from membership therein, and pass into the condition of a mere subject.

Now it is perhaps to be wondered at that a view concerning the location and general nature of the political sovereign in the United States so exceedingly simple as the foregoing, and so much in accordance with what, upon *a priori* grounds, one might expect to be the truth about a federal Union or composite state, should up to the present time have enlisted the approval of so few thoughtful Americans. The main difficulty has arisen, I think, from the circumstances surrounding the birth of the Republic. In 1776, and before, France was permeated with Rousseau's idea of government by the consent of the governed. At the same time

respect to the higher powers of sovereignty, subject to . . . control . . . and were never separately known as a member of the family of nations." Thomas M. Cooley, *Constitutional Limitations* (3d ed. 1874), pp. 6, 7.

"The thirteen colonies did not, as thirteen separate and mutually independent commonwealths, enter into a compact to sever bonds which connected them with the mother country." "They (the states) did not possess the peculiar features of sovereignty, — they could not make war, nor alliances, nor treaties." Dr. H. Von Holst, *Constitutional and Political History of the United States*, vol. i. (1877) pp. 6, 24 n.

¹ *Theory of Our National Existence* (1881), pp. 393-4.

² *Theory of Our National Existence* (1881), p. 133 n. (Brownson) and pp. 151-2.

America was writhing under the tyranny of a single monarch and despot, George III. The result was the creation throughout the land of an implacable animosity toward anything and everything in the form of a determinate person, or of determinate persons, holding the powers of sovereignty, and this sentiment has maintained itself with exceeding vigor down to the present. An illustration of this sentiment, as it existed at the close of the last century, may be found in the language of Judges Jay and Wilson, of the United States Supreme Court, in the case of *Chisholm v. Georgia*. "At the revolution," says Judge Jay, "the sovereignty devolved on the people, and they are truly the sovereigns of the country; but they are sovereigns without subjects (unless the African slaves among us may be so called), and have none to govern but themselves." And Judge Wilson says: "Under the Constitution there are citizens, but no subjects." From the idea thus set forth, that, whatever might be true of European nations, the United States had "got rid of the relation of sovereign and subject, and were to be like a perpetual-motion machine going on forever, without the effort of personal will supported by force," it was but an imperceptible step to the further idea, that, in the words of Mr. Hurd, "writing fairly engrossed on parchment, tagged with a lump of seal-wax and called the Constitution, would govern in spite of their wills those by whose wills it was to continue as law." That is to say, the American people, because of their dislike of political sovereigns, having convinced themselves that there was none to which they were subject, very naturally fell into the way of regarding law as sovereign, as something which by its own inherent force—particularly as embodied in the national Constitution—bound the states individually and the states collectively. Professor Dicey and Mr. Bryce have both remarked upon the prevalence of the spirit of legalism in this country—of the disposition to discuss political ideas from the standpoint of the lawyer—and what has just been said furnishes, I think, the explanation of this spirit and disposition: it is simply the manifestation of the national conviction that law binds the lawgiver—that, in the extreme sense maintained by the most destructive members of the destructive branch of Austinian critics the sovereign is subject to legal limitation.

That Mr. Hurd failed, during his life, even to modify in any very perceptible degree this national conviction, is not surprising. Indeed it would have been surprising had he not failed, for the conviction that the sovereign, like anybody else, is strictly amenable

to rules of positive law, and hence, as sovereign, virtually non-existent, is, with us — as has already been seen — quite as much prejudice as it is conviction, and therefore deeply rooted. But, for all that, convictions, even though they be prejudices, and even though they be prejudices of national proportions, should not be wholly beyond the reach of intellectual influences such as those of which Mr. Hurd was the author.

Let us accordingly proceed to note the leading views concerning the nature of the American Union which have been promulgated, and see how well or ill they meet the test of recognized historical facts, in comparison with the views of Mr. Hurd. The view which we shall consider first is that which was maintained by the state sovereignty or separatist party — a party having many adherents in Virginia, but whose most conspicuous members were the South Carolinians headed by John C. Calhoun. The state sovereignty view is based upon three propositions: (1) that the states were, as a matter of fact, at one time separately sovereign; (2) that sovereignty cannot be transferred under the terms of any legal contract or agreement; and (3) that sovereignty cannot, from its nature, be divided into parts. The last two of these propositions are, I think, demonstrably sound. It is evident that two or more actual sovereigns — be these sovereigns states or individuals — cannot make a legal contract by which they surrender their sovereignty either to one of themselves or to any outside sovereign,¹ for a legal contract is something that exists only as there exists law for its enforcement; and if there exists law for the enforcement of a contract between sovereigns, the sovereigns are not in reality sovereigns at all, in that there is law above them. The only agreements, therefore, which are possible between sovereigns are such as are dependent for enforcement upon purely moral considerations — such, that is to say, as are enforceable only with the consent of all the parties to them, and this is just what the state sovereignty advocates have always maintained. It

¹ It is evident that sovereignty cannot be transferred by any binding agreement. What makes a transfer of sovereignty binding is simply the possession, on the part of the transferee, of power and force sufficient to prevent the transferor from regaining it. See, upon this point, Willoughby's *The Nature of the State* (1896), p. 229, Dicey's *Law of the Constitution* (5th ed. 1897), pp. 65 n., 66 n., and *The Nature of the Federal State*, by E. V. Robinson, in *Annals of the American Academy*, May, 1894. Speaking of the accession of Texas to the Union, Mr. Hurd says: "Texas accepted a place in that single possession of sovereignty (by the states in union), and so necessarily abandoned all other sovereignty, accepting autonomy as a state while acquiring sovereignty as a member of the union state, and only as such."

is equally evident, I think, that sovereignty is a unit and indivisible. The subject, however, will be referred to again a little further along. But as to the first proposition laid down in support of the state sovereignty view, namely, that the states were at one time separately sovereign, I cannot but feel convinced that it finds no justification in history, and that Mr. Hurd has done excellent service for clear thinking in his emphatic denial of it. The declaration in the old Articles of Confederation, which preceded the federal Constitution, that each state retains its sovereignty, freedom, and independence, is doubtless — as already pointed out — the circumstance chiefly relied upon as proof that the states were at one time separately sovereign. But in relying upon words to prove the whereabouts of political sovereignty, the advocates of separatism forget that sovereignty is purely a question of fact — a political not a legal question. And in the light of facts the states have never been sovereign otherwise than collectively or in union. In other words, the states gained their independence from Great Britain not individually but in union; they were able to maintain such independence not individually but in union;¹ their local governments and institutions, therefore, no less than the general or federal government and institutions, depended for existence upon, and solely upon, the states collectively, the states in union. The states, either individually or otherwise, might adopt articles without number loudly proclaiming their separate sovereignty, but so long as they did nothing habitually to indicate separate sovereignty, took habitually no sovereign steps (sent no ambassadors, made neither war nor peace), they were no more individually sovereign than would be some natural person, member of a sovereign corporation, who, all the time that he was habitually obeying the mandates of the corporation, went about excitedly telling his friends that, although appearances were against him, he was sovereign and not the corporation, and that, if he only would, he could teach the corporation its place.

But, say the advocates of state sovereignty, the states of Rhode Island and North Carolina certainly did more than protest their separate sovereignty, for the former took no part in the convention which discussed and adopted the federal Constitution, and both, by refusing ratification of it for a year, remained for that period entirely out of the Union. Now what these two states in fact did, upon Mr. Hurd's interpretation of history, is this: first,

¹ Hurd's *Union State* (1890), pp. 48-9.

as members of the oligarchy of communities constituting the American Union, they fought for and helped to gain independence for the Union and autonomy for themselves; second, one of them abstained from taking part in a great convention which was participated in by the other members of the oligarchy, and both held aloof from Congress; hence their conduct at least approximated that of states which, by refusing or neglecting to be represented in the national conferences, abjure their political existence, and are governed by the states — the states remaining in union.¹ The very continuance of local government in these two states, during the year of their so-called isolation, proves that they were in the Union as dependencies, if not otherwise; for it was only under the ægis and protection of the Union that even local government, as against possible foreign interference, could be maintained within their borders. To make use again of the illustration of the natural person, member of an oligarchy or sovereign corporation, Rhode Island and North Carolina were during their year of isolation, so-called, in an attitude of the "sulks" toward their associates. They could not be said to be habitually disobedient to their political superior; they were too feeble to be, — perhaps did not even wish to be. But they did not enjoy the society of that superior, and so availed themselves of the privilege of members of any corporation and remained for a time away from the council board. The council however, meanwhile, possessed full power over them, and, while extending with one hand the olive branch, did not disguise the fact that the other hand held the sword.

The second view of a leading character concerning the nature of the American Union, which we shall consider in comparison with the view of Mr. Hurd, is that which, before the Civil War, commanded the assent of such men as Hamilton, Story, and Webster; during the Civil War, of such men as Chase, Sumner, and Lincoln; and since the war, of such men as Garfield, Blaine, Judge Cooley, Justice Miller, and a host of others. The political parties which have successively maintained this view have been the Federalist, the Whig, and the Republican, and the view itself may not inaptly be called the Nationalist or Consolidationist view. Its principal tenets are: (1) that political sovereignty resides in the whole people of the country — the people *en masse*, the unorganized people;² (2) that the federal Constitution was ordained and

¹ Hurd's *Union State* (1890), pp. 100-1, 102-3.

² For a recent exposition of this view, see *National Sovereignty*, by John A. Jameson, in the *Political Science Quarterly* for June, 1890.

established by the whole people, and that this instrument created the federal government and re-created the states, endowing both with certain powers of sovereignty, which are in consequence held subject to the Constitution as law. But there are different branches of those who maintain the consolidationist view. There are those — as, for example, Professor John N. Pomeroy, Judge Thomas M. Cooley, and Dr. H. Von Holst — who contend that the several states never were sovereign; that they were always in subjection to the whole people of the country. Then there are those who contend that, while the whole people were originally sovereign through the Continental Congress, their agent, the several states afterwards usurped the powers of the people and were only ousted from such usurpation by a second usurpation, namely, one conducted by the convention which draughted and submitted the federal Constitution. Among the advocates of the usurpation idea may be mentioned Professor John W. Burgess, Professor Edward P. Smith, and Mr. W. W. Willoughby.¹ Another branch of the consolidationists is one which places much stress upon the doctrine that sovereignty is divisible, and that in the United States sovereign powers are exercised both by the federal government and by the states. Perhaps the two most prominent American writers who maintain the divisibility of sovereignty are Mr. George T. Curtis, author of *The History of the Constitution*, and Mr. A. Lawrence Lowell. The same doctrine, moreover, has frequently been urged by judges of the United States Supreme Court, from Salmon P. Chase to Samuel F. Miller. But what these advocates mean by "sovereignty" is sovereignty under law, sovereignty under the Constitution, the sort of sovereignty that, when in dispute between a state and the federal government, is adjudged by the latter both for itself and for the state. But in the political sense — in the Austinian sense — this is not sovereignty at all. As Mr. Hurd truly says: "The powers held by the states cannot be sovereign in any sense when the use made of them by the state governments is subject to the judgment of any department of another [the federal] government holding the other powers of sovereignty."²

¹ *The American Commonwealth*, by John W. Burgess, in the *Political Science Quarterly* (1886), vol. i. pp. 21-2.

The Movement towards a Second Constitutional Convention, by Edward P. Smith (1889), p. 48. (Professor Smith is of Johns Hopkins University.)

The Nature of the State (1896), pp. 267-8.

² Mr. Willoughby takes a like position. *The Nature of the State* (1896), p. 197.

Mr. Bateman also remarks: "If once the sovereign cedes his right to determine who the sovereign rightfully is, he can thence no longer be sovereign." *Political*

Before saying more, however, upon the question of a divided sovereignty in the United States, it will be well to take up for purposes of comparison with Mr. Hurd's view the points involved in the two main tenets of the consolidationists: (1) that the political sovereign in this country is the whole people; and (2) that the federal Constitution created the federal government and re-created the states. In no country, I think, can the mere people, the people *en masse*, be called politically sovereign, for the reason that, as has been stated by Professor Sidgwick, power to be political — that is, to exist in contradistinction to social power or mob power — must be consciously possessed, and hence must be the outgrowth of the habit of concerted action. This is only to put more explicitly what Austin meant when he said that political power must be determinate in a particular person, or in particular persons; for the people at large, the "whole people," as distinguished from particular persons, are utterly incapable of concerted action, and hence of exercising political power. It is a circumstance significantly in favor of this conclusion that it is mostly in those states (such, for example, as France) in which the sovereignty of the "whole people" has been most loudly proclaimed and persistently acted upon, that irresponsible governments most have flourished; for where the government, or agent, is held in check by everybody in general and nobody in particular — no specialized power-holders — it can virtually do what it pleases. It acts in the name of the "whole people," as did Marat (*ami du peuple*, alias *roi du peuple*) and the other bloodhounds of the French Revolution; and the "whole people," being without organization, without the habit of concerted action, does nothing, and can do nothing, but let "the government" have its will. Not simply "O Liberty!" but "O people!" (Madame Roland might have ejaculated), "how many crimes are committed in thy name!" But the whole argument against the consolidationist idea of the sovereignty of the people *en masse* in the United States is thus forcibly put by Mr. Hurd: "If the people, as found in the political corporations called the states, existing in union as one sovereignty, as political fact before any written constitution, do not hold the ultimate power of a nation among nations, there is (in this country) no *people* at all to hold it; because in the nature of things no people merely as inhabitants

and Constitutional Law (1876), p. 161. Under the claim, therefore, of the right of the federal government to construe the extent of its own powers in all cases, sovereignty must be predicated of the federal government *alone*.

of a portion of earth-surface ever could consciously exercise such power or be known as a nation among nations.”¹

With regard to the second main tenet of the consolidationists, namely, that the Constitution created the federal government and re-created the states, the obvious remark to be made is that such a tenet, if accepted, compels us to regard the states as mere administrative departments of a central government. The Constitution is a mere document, and if any power created or re-created the states — that is, if the states are not, as Mr. Hurd contends, the original oligarchical power-holders that created the federal government and the Constitution, and that, in their collective political capacity, maintain both in existence — why then they are nothing but conveniences for the federal government as the only determinate or comeatable organ of that otherwise amorphous body, the “whole people.” Now there are those, consolidationists though (as it would seem to me) they must be called, who do not at all relish the thought of being forced to deny political existence to the states. Professor Woodrow Wilson, of Princeton, is one of these, and so also is Professor Richard Hudson, of Ann Arbor, as shown by his article on State Autonomy in the *New Englander and Yale Review* for January, 1888. But, if the second main tenet of consolidationism be accepted, how can political existence in any real sense be predicated of the states? They owe everything to the people, — that is to say, to the federal government, and are dependent upon that government for everything.² That there is

¹ Hurd's *Centennial of a Revolution* (1888), p. 91.

² Professor Wilson's position is that the states are more than administrative districts or departments, because they are not subject to the commands of the federal government within their own peculiar sphere. *The State: Elements of Historical and Practical Politics* (Revised ed. 1899), pp. 468-9. But does not such a statement merely ignore the difficulty? There is frequent difference of opinion between states and the federal government as to what is the peculiar sphere of the latter; and, according to the consolidationists and Professor Wilson, such difference of opinion must always be decided by the federal government as a question arising under the Constitution as law. Now this is equivalent to reducing the states to a subordinate or departmental position; for if a state must, in all matters as to which its authority is called in question, submit to the decision of the federal government, wherein does it essentially differ from a public or private corporation, which within its sphere (and this is sometimes fixed by the state constitution) is not subject to be commanded, but which, in every case raising a question as to what that sphere is, must submit to the decision of the state? Both Mr. Willoughby (*The Nature of the State*, pp. 249-51) and Professor Dicey (*Law of the Constitution*, pp. 141-2) are against the position taken by Professor Wilson. Professor Dicey says: “Every legislative assembly [even a state constitutional convention], under a federal constitution, is merely a subordinate law-making body whose laws are of the nature of by-laws, — valid whilst

no halting-place for the states — on consolidationist principles — short of this is fully recognized by such writers as Professor Dicey and Mr. Willoughby. Another writer — Professor John W. Burgess — author of the paper published in the *Political Science Quarterly* for March, 1886, entitled *The American Commonwealth* — and whose consolidationism is the most ultra imaginable — says much the same thing. How different is the position of the states in our Union, according to Mr. Hurd! Instead of being the creature of the federal government, they are collectively its creator and maintainer. They exist as distinctive political societies or organisms in the Austinian sense, each an integer of a sovereign corporation. To use again a favorite illustration, while the states, according to the consolidationists, are merely a convenient congeries of individuals with no special rights or privileges, they are, according to Mr. Hurd, as mighty lords, coördainers in the government of an empire.

Recurring now to the consolidationist doctrine of a division of sovereignty between the federal government and the states, it will not be forgotten that we found this doctrine to be self-contradictory in that there was ascribed to the federal government — in case of any dispute between it and a state regarding the possession of some power of sovereignty — the exclusive right to adjudge the matter both for the state and for itself. Still, self-contradictory though the doctrine be, it has played an important part in our political history. In all that class of cases before the Supreme Court of the United States during the reconstruction period, of which *Texas v. White* is an illustration, the trend of judicial opinion was in support of Chief Justice Chase's dictum, that the American Union is an indestructible union of indestructible states; and in Congress, in spite of some strong, but on the

within the authority conferred upon it by the Constitution." See, also, Professor John W. Burgess, in *Political Science and Constitutional Law* (1890), vol. i. pp. 52, 79.

Under Mr. Hurd's view, the states are not departments of the federal government, because they have an existence that is political as creators and maintainers of that government, and that cannot be legally passed upon by it. For example, should the federal government ever attempt to construe the Constitution in such a way as to deprive the states of their right to send, or refrain from sending, representatives to Congress, or to fix the qualifications of voters within their limits, the states collectively — as many of them as were necessary in order to enforce compliance with their will — could, in their purely political capacity, and hence without any violation of law, arise and forbid such construction. If instead of so doing, the collective states were to submit to the construction supposed, this would be (in so far) a surrender of sovereignty by them, and an investiture of the federal government therewith — in other words, a step, and a long one, towards revolution.

whole blind protests, the same trend of opinion is discernible. Chase's dictum was evidently inspired by the conviction, generally entertained, that in some way the states were sovereign, as well as the Union; and that the eleven states that undertook to secede from the Union continued to exist as states, as political societies, in spite of their secession attitude. At the same time there was, in no less degree, the general belief on the part of the judges of the Supreme Court, members of Congress, and the people, that the individual citizens of these eleven recalcitrant states were personally amenable to the law of treason. It will at once be seen, however, that the two positions are contradictory. If the eleven states were in any intelligible sense sovereign, they could command the allegiance of their citizens, and this for purposes of secession as well as for any other purpose. But if the citizens of these states — as is really the fact in a multitude of instances, and constructively is so in all — became secessionists because their states so demanded, why then they had not freedom of choice, and were not legally chargeable with treason. There seems little doubt that reasoning of this sort had weight in constraining the federal legal authorities to drop the indictment against Jefferson Davis.¹ All uncertainty as to the crime of treason in cases like that of Davis, or of any leader of rebellion in the United States, is, however, completely set at rest, if we adopt Mr. Hurd's view regarding the nature and location of political sovereignty among us. That is to say, according to Mr. Hurd, sovereignty in the United States is the one and indivisible sovereignty of Austin, residing in the states collectively and operating with full vigor upon the citizens of any and every individual state which by acts of rebellion lays aside its statehood or political existence, and voluntarily becomes a mere dependency or territory. On this view, the question of state allegiance does not arise; for, whenever a state resists the authority of the sovereign corporation to which it belongs, it loses its capacity as a member of the corporation, and passes into the category of a mere subject population.

We have considered thus far two leading views concerning the nature of the American Union: the state sovereignty view, and

¹ "The federal government at the close of the war had it in its power to set at rest the vexed question [of treason] by bringing the case against Jefferson Davis to trial. But the victors dreaded the result in their own tribunals. There was a widespread impression that a judicial investigation would end in establishing the fact that Mr. Davis and his associates were not, in any legal sense, rebels or traitors." *The Atlanta (Ga.) Constitution*, May 30, 1887.

that of the extreme nationalists or consolidationists. There remains one more view to be considered, which, if not leading in the sense of having many advocates, is so in intrinsic importance. This is the view that the Civil War settled the question of the nature of the American Union; in other words, that before the Civil War the location of political sovereignty here was not conclusively in the nation at large, or in the federal government as the organ of such nation,¹ and that it was only the manifestation of physical force by the federal government during the war that proved that government to be the place where political sovereignty was located. What such a view comes to practically is that the Civil War wrought a revolution in the Union; and among the advocates of the view may be mentioned Professor Christopher G. Tiedeman, of the University of Missouri,² and the editor of the *New York Nation*. The latter, writing in 1887, said: "Consider the condition of doubt in which the old Constitution [it would seem that we have a *new* Constitution now!] left a large part of the population as to the real seat of sovereignty in the United States. . . . It fell to the lot of the men of 1861 to settle once for all whether the federal government was a national government or not." And writing in 1899, the same editor says: "The Civil War settled all that" (namely, that the federal government is supreme). In the way of proofs that the Civil War wrought a revolution in the Union, a number of things are adduced: (1) the decisions of the United States Supreme Court in the cases of *Ex parte Siebold* and *Ex parte Clarke*, by which certain state election officers were held amenable to federal authority, and in which various dicta are laid down by the judges to the effect that "it is the duty of the states to elect representatives to Congress;" that "the government of the United States is no less concerned in the transaction than the state governments;" and that, indeed, "the due and fair election of these representatives is of vital importance to the United States;" (2) the growing disposition on the part of lawyers (and, as has already been intimated in this paper, lawyers in the United States, by reason of the legalism everywhere prevalent, are especially potent) to clothe the national Supreme Court with the powers of a political arbiter³—something wholly

¹ The Growth of American Nationality, by President F. A. Walker, in the *Forum*, June, 1895. Mr. Fitzjames Stephen describes the condition of the American Union before the Civil War as one of "dormant anarchy." Maine, *Early History of Institutions*, p. 377.

² The Unwritten Constitution of the United States (1890), p. 125.

³ "The modern plan of making the political question dependent on the issues of

foreign to its duties as prescribed in the Constitution ; and (3) the tendency of the Republican party — especially as manifested before the first election of Mr. Cleveland — to regard the federal government as the sovereign in the United States ; and not only so, but to claim the right perpetually to determine the personnel of that government, on the ground that the opposite party, in denying it to be sovereign, have placed themselves in an attitude essentially traitorous.

It is indisputable that there is a certain force in these so-called proofs, but only, I think, as showing that there is grave danger that the Union may some day be permitted to be revolutionized, not that it has been revolutionized already. So long as the several states keep the right to fix the qualifications of voters for representatives in Congress, and to choose United States senators and presidential electors, just so long will it remain essentially true that the political sovereign in the United States is the states collectively, the states in union, and that the federal government is naught but the agent of this sovereign, created and maintained thereby. Some perception of the truth of this conclusion is shown even by our ultra-consolidationist contributor to the *Political Science Quarterly* for March, 1886, for he says : " In the way of the complete relegation of the states to this position [that of mere administrative departments of the federal government] stand three things : first, their control over the elections of the organs of the central government ; second, the election of the members of the national senate by the commonwealth legislatures ; and third, the equal representation of the commonwealths in the national senate." Where the danger to the continuance of the existing Union mainly lies — as indicated by the so-called proofs of accomplished revolution already given — is in indifference on the part of the various state electorates — indifference arising from a failure to realize the true nature of the Union — to changes which may hereafter be proposed fraught with loss to the states

some private litigation, to be decided like any other contested matter incidental to the suit, seems illogical and unsystematic ; but it does not offend by any show of authority ; it takes the initiative from the court and gives it to any private citizen ; it receives respect without seeming to command it." Simeon E. Baldwin, *The American Law Review*, vol. 23 (1889), p. 880. Upon the above Mr. Hurd remarks : " But a still more violent contradiction of the spirit of the Constitution, as a code, is given, when judicial precedents, derived from cases decided by a tribunal which by its place under the Constitution is identified with one of the parties litigant, are taken as political precedents having the sanction of the Constitution for the exercise or restraint of authority as between such parties." *The Union State* (1890), p. 118.

of the power to determine their own electorates. And it is out of this danger that the great opportunity and mission of the Democratic party in this country arises. For many years this party has preached the conservation of the rights of the states, but the trouble has been that, excepting when advocating state rights in the sense of state sovereignty, there has rarely been anything intelligible and specific in the claim of rights made for the states by the Democratic party. The party has always found it difficult to place the finger upon the rights which they wished to conserve; or rather, perhaps, to give any clear reason why the conserving of this or that "right" would count toward the maintenance of a union of the states different from the kind of union the Republican or consolidationist party was willing should be maintained. Under the tuition of Mr. Hurd, the Democratic party would in future, were occasion to arise, be able not only vigorously to oppose measures for the federal control of congressional elections, and all "force bills," but to oppose such measures on the true ground, namely, that they are in derogation of the real nature of the Union, as an oligarchy of states holding the federal government, by political right above law, strictly in subordination as the agent of such oligarchy.

We have now considered the last of the various points upon which it was desired to make some expression in this paper. In the course of our survey we have been impressed, first, with the parallelism existing alike between the lives and the speculations of John Austin and John C. Hurd. We have taken up once more the famous definition of political sovereignty formulated by Austin. Passing then to the United States of America, we have observed how, through the application of this definition, Mr. Hurd was able to formulate his idea of the American Union as one in which the political sovereign is the states collectively; and how this idea has, to a great extent, thus far failed of its natural effect, by reason of the national prepossession against sovereignty and subjection. But we have also observed the wonderful fruitfulness of the idea in its power to explain, consistently and intelligibly, a whole series of perplexing political problems:—as, for example, why the several states of the Union were never separately sovereign, although so asserted to be by the state sovereignty party of Calhoun; why—although the contrary is maintained by the consolidationist party of to-day—sovereignty cannot inhere in the whole people; why the states are not mere administrative departments of the federal government; why sovereignty in the Union

is not parcelled out between the federal government and the states ; why an individual state is not precluded from abjuring its political existence ; and why, on this account, treason against the United States in time of Civil War becomes a perfectly simple thing. Again, the power of Mr. Hurd's idea to solve difficult problems has been seen in the replies which it furnishes to such questions as these : Has there been a revolution in the nature of the American Union through and by reason of the Civil War ? Has the national Supreme Court in our system, in any sense the power of a political arbiter ? And, lastly, what is the true sphere and mission of political parties in the American Union, and more especially of the Democratic party ?

Surely without exaggeration it may be said that the conclusions of John Austin, applied in detail to the circumstances of the United States by John C. Hurd, are a valuable heritage to the nation, destined (if not now) at some crisis in our affairs to bear fruit the more golden in that it has been so long delayed.

Irving B. Richman.

MUSCATINE, IOWA, November 19, 1900.

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A CORRECTION.

Owing to an error a clause was omitted in the note appended to Mr. Morse's article on "The Civil and Political Status of the Inhabitants of Ceded Territories" which appeared in the December number of the HARVARD LAW REVIEW. The sentence beginning on line 15 of the note embodying Mr. Kennedy's comment on Mr. Morse's article (p. 272) should read as follows: "They had over 7000 Spanish prisoners whom they had captured with the towns and forts on the coast as well as in the interior," etc.

PROOF OF CONTINGENT CLAIMS IN BANKRUPTCY. — A late referee's decision draws attention to a noticeable omission in the United States Bankruptcy Law of 1898. The bankrupts had guaranteed the payment of certain notes at their maturity, which did not occur until a short time after the beginning of the bankruptcy proceedings. The holder of the notes sought to prove against the estate, but the claim was dismissed on the ground that the bankrupts had been under no "fixed liability absolutely owing at the time of the filing of the petition," within section 63 a (1) of the present act. *In the matter of J. R. McCauley & Sons*, 2 N. B. N. Rep. 1085. The result reached was necessary, as the present law fails to provide in any way for the proof of contingent debts, except in the case of a surety of the bankrupt proving in the creditor's name (sec. 57 i.).

This exclusion of contingent claims from proof is a return to the rule of the older English and American statutes, which provided only for liquidated debts absolutely owing at the time of the bankruptcy. However,

with the development of ideas as to the proper scope of bankruptcy proceedings, this narrow rule was changed in both countries. In England, the statute of 6 Geo. IV. c. 16, s. 56, first provided for the proof of contingent debts. This act was interpreted as including the debts of a bankrupt guarantor. *Ex parte Myers*, M. & Bl. 229. In all subsequent English statutes there has been a provision for contingent debts and liabilities, and the manifest purpose of the present act (46 & 47 Vict. c. 52, s. 37) is to free the debtor from every possible liability, however contingent. The only restriction is the provision that the court may exclude a liability from proof when its value is incapable of being fairly estimated. In the United States the first provision for the proof of contingent liabilities appeared in section 5 of the Act of 1841 (5 Stats. 444), and this was followed by even broader provisions in the Act of 1867, sect. 19 (R. S. §§ 5068, 5069). Both of these statutes allowed the proof of contingent liabilities on their becoming absolute, and provided for the ascertainment of the present value of contingent claims, and for their proof at such valuation. These acts, in spite of their seemingly all-comprehensive provisions, were differently interpreted in various jurisdictions. Some courts limited the Act of 1841 to existing demands upon which the cause of action depended on a contingency, excluding demands whose existence depended on a contingency. *French v. Morse*, 68 Mass. 111. Others held under both acts that when it was impossible to liquidate the claim properly, it should not be allowed. *Ryppin v. Maguire*, 15 Wall. 549; *Eastman v. Hibbard*, 54 N. H. 504. While still others were of the opinion that the broad words of the enactments must be construed as discharging the bankrupt from every possible liability, no matter how difficult it might be to ascertain the true value of the claim. *Tobias v. Rogers*, 13 N. Y. 59; *Reitz v. People*, 72 Ill. 435. It would seem that this last view was correct in its interpretation of the statutes, and desirable in its effect. Moreover, most of the cases which refused to allow proof of contingent liabilities because of the impossibility of liquidation dealt with claims against sureties on bonds for the proper performance of duties, or other instances where the chance of breach is infinitesimal. This is very different from the case of the guarantor of a note, where the liability must become absolute, if at all, at a known and fixed date. In fact, there seems little doubt that under these acts the claim in the principal case would have been allowed, especially since the liability of the bankrupt could have been absolutely ascertained within a very short time after the beginning of the proceedings.

The Act of 1898, in failing to protect bankrupts against any contingent claims, however soon after the filing of the petition the contingency may happen, seems a distinct retrogression from the trend of opinion as expressed in the more modern acts. The omission, whether intentional or a mistake, is much to be deplored. Bankruptcy proceedings should clear a man from all possible debts and liabilities, giving him a chance to start absolutely afresh. And the desirability of this result should outweigh the difficulty of liquidating the claim, even where it is doubtful whether or not there ever will be a liability, and though its value may depend on the chances of another man's solvency.

ACQUISITION OF TITLE UNDER THE STATUTE OF LIMITATIONS. — An interesting question in the law of real property is raised by a recent Massachusetts decision. While the plaintiff's predecessor was in possession of certain land, under what the case calls a license from the owner, the latter conveyed the land in fee to a stranger. The occupant had no knowledge of this conveyance, and remained in possession for more than twenty years, thinking that the ownership was unchanged and the license still in force. It was held that, although the license was terminated by the conveyance and the occupant had ever since been liable to a writ of entry, the statute of limitations did not run because the occupant did not claim the fee, and because there was no disseisin except the fictitious one which the owner might force upon the occupant at any time for the purpose of bringing action. *Bond v. O'Gara*, 58 N. E. Rep. 275. It is difficult to understand from the meagre report in what sense the word license is used, but it is clear from the opinion that the occupant must have had complete possession. Otherwise his occupancy for any length of time could give nothing more than an easement, and the case would be summarily disposed of. Though there is some little authority to the contrary, it is almost unanimously held that complete possession under a bare permission from the owner creates a strict tenancy at will. *Den v. Drake*, 14 N. J. Law, 523. And furthermore, though it is frequently said that a conveyance by the landlord terminates a tenancy at will, it seems to be settled by the cases that the tenancy is not ended nor the tenant affected till he learns of the conveyance. *Pratt v. Farrar*, 10 Allen, 520; *Doe v. Thomas*, 6 Exch. 857. If we apply these doctrines to the principal case, it follows that the occupant was a tenant at will before the conveyance and that he remained so during his entire occupancy, since he never knew of the conveyance and there was no other determination of the will. The tenancy would be a peculiar one, for attornment being obsolete, he must have been the tenant of a man of whom he knew nothing, and the moment he learned whose tenant he was, he would cease to be a tenant at all. Nevertheless this curious result seems to be demanded by the authorities. It would follow at once that the statute of limitations did not run.

But the court evidently took a different view of the relations between the parties, though it is not quite clear whether they regarded the occupant as a trespasser or as a sort of tenant at sufferance. Two things, however, are definitely stated by the court: that the license was ended by the conveyance, and that a right of action had ever since existed. This latter proposition, if we look only at the language of the statute of limitations, would apparently be conclusive against any claim by the grantee; for the statute merely says that no right of action or entry shall be enforced except within twenty years of the time when the right first accrued. Rightly or wrongly, however, the courts in general seem never to have adopted so simple an interpretation of the statute. Influenced apparently by the doctrine of prescription, they have made adverse possession, of which the statute says nothing, the test of its application, and have frequently held possession not to be adverse though a right of action had existed for the statutory period. Yet admitting all this, it is hard to see why, if we adopt the view taken by the court of the relations between the parties, the possession in the principal case was not adverse. There may be adverse possession without disseisin. *Doe d. Parker v. Gregory*, 2 A. & E. 14. And though the occupant did not claim the fee

in himself, his holding involved a claim that the fee was in another not the true owner, a claim essentially adverse to the owner's title. It is held by the better authorities that there is adverse possession when a grantee occupies by mistake a strip of land which he erroneously supposes to be included in his deed, and there is little doubt that this doctrine would be applied if the same mistake were made by a lessee. *McNeely v. Langan*, 22 Ohio St. 32. But in such a case the lessee claims to hold the strip of land as belonging to one who in fact neither owns nor claims it, and under a lease which does not cover it. The case is exactly parallel to that of an occupant claiming to hold land as belonging to one not in fact the owner, under a license which is no longer in existence. Whether the occupant in such cases acquires title for himself, or for the one under whom he claims to hold, is a doubtful question which need not be here discussed. But if we exclude the idea of tenancy in the principal case, both the language of the statute and the character of the possession require the decision that either the occupant or his licensor had acquired title from the grantee under the statute.

Accordingly the decision that the statute did not begin to run can be supported only on the ground, not recognized by the court but apparently correct, that the occupant was a tenant at will during the entire period in question.

MURDER OF THE INSURED BY THE BENEFICIARY.—The cases determining the effect of the murder of the insured by the beneficiary, upon the liability of an insurer, are not numerous. In every case where this question has been passed upon it has been held that the murderer, at least, can derive no advantage from his crime. *Insurance Co. v. Armstrong*, 117 U. S. 591; *Cleaver v. Association*, [1892] 1 Q. B. 147. The Supreme Court of Iowa has recently furnished us with an interesting decision on the point. *Schmidt v. Northern Life Ass'n*, 83 N. W. Rep. 800. The beneficiary of a mutual benefit certificate murdered the insured. The court held that the association was a trustee for the beneficiary of the money payable on the certificate, but that her rights being barred by her crime, a resulting trust arose for the administrator of the insured. While the result of the principal case seems correct, it is difficult to concur in all the reasoning of the court. For as no specific portion of the association's assets was ever set apart to meet the claim on the certificate, there was no trust *res*, and consequently the association could not be a trustee. The court based its decision largely on *Cleaver v. Association*, *supra*. There the assignee of Mrs. Maybrick was claiming against the insurance company on a policy on Mr. Maybrick's life. The court held that by the Married Woman's Property Act the administrator of the insured held the right of action on the policy in trust for the beneficiary, but that as Mrs. Maybrick, the beneficiary, had murdered the insured, public policy terminated the trust as to her, and a resulting trust arose for the estate of the insured. But as Iowa has adopted the principle of *Lawrence v. Fox*, that it is the beneficiary of a contract who has the right of action, the administrator in the principal case could have no claim against the insurers on the policy. To the legal right of action of the beneficiary or her assignee—who could only sue in her name—the insurer had a complete defence on the ground of public policy. Yet it would be most unfortunate to allow the insurer to profit by the accident of

the beneficiary's inability to collect the insurance; accordingly a quasi-contractual obligation on the insurer to pay the administrators of the insured arises to prevent this unjust enrichment. This case is clearly within the principle of the established rule that, when because of a statute requiring insurable interest a beneficiary cannot take, the policy is not thereby avoided. *Shea v. Benefit Association*, 160 Mass. 289. For it is evident that as respects the insurer's rights it can make no difference whether the beneficiary's disability is due to a statute or to her own crime.

The court in the principal case, however, attempted to draw a distinction between the ordinary life insurance policy and the benefit association certificate, on the ground that while in the former the contract is with the beneficiary, in the latter it is with the insured himself. It is very doubtful whether there is any satisfactory principle to support this distinction; nevertheless it has been adopted in some cases. Still, even on this view the principal case was rightly decided, though the reasoning of the court that the association was a trustee is none the less unsound. For the administrators of the insured would have the legal claim against the insurer. This they would ordinarily hold in trust for the beneficiary, but owing to the crime of the beneficiary in the principal case, public policy would prevent the carrying out of the trust. However, this defence of public policy would not bar the administrators of their claim against the insurers, and this they would hold as a resulting trust for the estate of the deceased. Thus on either view the satisfactory result may be reached without doing any violence to legal principles.

RIGHTS INCIDENTAL TO LITTORAL OWNERSHIP. — Since littoral rights are natural and are attached to land, they belong to a man only because he is owner of shore land. When the owner loses all his land by erosion, it is difficult to see how he can retain any littoral rights, as he no longer has any land to which they can attach. A recent New Jersey decision, however, denies that he loses all his rights in such a case. *Ocean City Association v. Shriver*, 46 Atl. Rep. 690 (N. J., C. A.). The plaintiff, owner of a large littoral tract, conveyed to the defendant's grantor a lot which was separated from the ocean by other land of the plaintiff's. The sea gradually washed away the intervening land until the line of ordinary high water reached the remote lot. Later the ocean receded and the plaintiff claimed the land thus uncovered. The court held that the plaintiff was entitled to the accretions beyond the original limits of the defendant's lot.

The only case presenting a similar question is *Welles v. Bailey*, 55 Conn. 292. In that case, the court reached the opposite conclusion, holding that when land once becomes riparian, it remains so, and the boundary line follows the gradual shifting of the river, even after it has encroached beyond the owner's original limits. The court, in the principal case, claims that this view of the law is at variance with the general doctrine as declared in Hale's "De Jure Maris," and as approved by a dictum in *Mulry v. Norton*, 100 N. Y. 424. It is doubtful whether this contention is correct, as Lord Hale evidently had in mind the case between the Crown and a littoral owner, and not at all a dispute between two successive littoral owners. The decision in the principal case seems to be indefensible. The court denies that the plaintiff has lost his title

to the land in spite of the fact that the law is perfectly well settled that land washed away by the gradual encroachment of the sea goes to the Crown. *In re Hull & Selby R. R.*, 5 M. & W. 333. Further, it maintains that as between vendor and vendee, he who was littoral owner at the time of the grant always remains so. The cases cited do not support such a doctrine, which has the effect of causing littoral rights to exist apart from the ownership of land, nor indeed can any authority for it be found. In view of the grounds of the decision, the difficulty seems to be that the court has failed to recognize that littoral rights are inseparably connected with land and can only belong to a man because he owns littoral land.

LEGAL CAUSE. — The basic principle that a man is liable only for injuries caused by his wrongful conduct involves the three elements of an injury to the plaintiff, a wrong on the part of the defendant, and causal connection between the wrong and the injury. Given the first two elements, what is to determine whether the wrong is the legal cause of the injury? The maxim, *Causa proxima non remota spectatur*, is, of itself, of no assistance. The definition of *causa proxima*, or legal cause, is one of the most disputed legal questions.

By the weight of authority the defendant's wrong is the legal cause of the injury, at least where under the surrounding circumstances the injury is such a consequence as the wrong-doer might and ought to have foreseen as likely to follow from his wrong, — in other words, when the consequence is the natural and probable result of the wrong. *Hoag v. Lake Shore & M. S. Ry. Co.*, 85 Pa. 293. But the better view is that this definition is not sufficiently inclusive. Shearm. and Redf. Negligence, 5th ed. § 28. It is not possible for a reasonable man to foresee all results which in fact are natural and probable, though if at the time such results had been brought to his attention he would have thought them so. *Ehrgott v. Mayor, etc. of New York*, 96 N. Y. 264. Hence it is necessary to add to the definition given that if a reasonable man would have foreseen that injury in some form was likely to result, and injury does result, the defendant is liable even though the precise form of the injury was not foreseen. *Hill v. Winsor*, 118 Mass. 251; *Christianson v. Chicago, etc. Ry. Co.*, 67 Minn. 94. The definition is not complete even with this addition; but without the qualification it is insufficient and not supported by the trend of authority.

The necessity of the addition is brought out by an interesting Indiana case. *Evansville, etc. R. Co. v. Welch*, 58 N. E. Rep. 88. The plaintiff, while standing on the platform of one of defendant's stations, was hit and injured by the body of a person who had been run over at a crossing near by through the negligence of the engineer. Following the case of *Wood v. Pa. R. Co.*, 177 Pa. St. 306, the court held that the demurrer to the declaration should not have been overruled since the negligence of the company was not the legal cause of plaintiff's injuries. The reasoning used in the decision is hardly logical. For the court argues that the company is not to be charged with foreseeing that death or injury to some one on the platform was likely to result from the negligence of the engineer, since the fact that large numbers of people every day use station platforms shows that reasonable men do not consider that death or injury are likely to result from standing on the platform. In other words,

the court holds that since the plaintiff did not, and could not be expected to, foresee defendant's negligence, therefore the defendant, when negligent, is not bound to foresee consequences likely to result from its negligence. But besides being insupportable on the reasons advanced by the court, the decision, both upon authority and principle, is wrong. In at least two cases where substantially the same facts raised the identical question, it has been held that the negligence of the engineer was the legal cause of the injury. *Western R. Co. v. Bailey*, 105 Ga. 100; *R. Co. v. Chapman*, 80 Ala. 615. Clearly the cases are within the rule of *Hill v. Winsor*, *supra*, for while it is not to be expected that a reasonable man would have foreseen that injury in this precise form was likely to result, one of the first consequences to be expected was death or injury to some one. Furthermore, if the negligence had caused the deceased to jump, on seeing his danger, thereby knocking the plaintiff down, upon ancient authority we know that the chain of causation would not have been broken. *Scott v. Shepherd*, 2 W. Bl. 892. If such had been the result, plaintiff's injuries would have been caused by the company's negligence, operating through the instinctive movement of a third person, which in the principal case the negligence operates through a force set in motion by the defendants. If the liability of the company is more clear in one case than in the other, it certainly does not seem to be in the case where the instinctive movement of a third person intervenes.

The decision that there is no liability in the principal case is caused by the rigid adherence to the "natural and probable" rule of causation, without recognizing the necessity of the qualification laid down in *Hill v. Winsor*, *supra*, and other cases cited. The case should have been left to the jury. If the court felt compelled to adopt the natural and probable consequence rule in its charge, the rule that the precise form of the injury need not have been foreseen should have been properly explained. See *Texas & P. R. Co. v. Short*, 58 S. W. 56 (Tex. Civ. App.).

THE VALIDITY OF AN ASSIGNMENT OF FUTURE WAGES. — If we regard the assignment of a future interest from the equitable standpoint, namely, as a present contract to take effect and attach as soon as the *res* of the assignment comes *in esse*, there is no difficulty in enforcing an assignment of a mere expectancy, when once that expectancy has materialized. There arises at common law, however, a difficulty which is suggested by a recent decision, holding that an assignment for a valuable consideration by an employee of his future earnings is invalid. *Silverstein v. Greshamer*, Chicago Legal News, Sept. 15. To support an assignment at law the subject-matter of the assignment must have an actual or potential existence. The assignment of a mere possibility is always invalid. Consequently, it has been held that an assignment of future wages to be earned under a prospective contract of employment is void (*Mulhall v. Quinn*, 1 Gray, 105), though in equity such a transaction has been enforced. *Edwards v. Peterson*, 80 Me. 37.

Courts of law, however, do enforce assignments of future wages where such wages are to be earned under an existing contract. It is said that the present contract imports a potential existence to the future wages sufficient to support a transfer. *Wade v. Bessey*, 76 Me. 412. In the principal case, there was no existing contract of employment, but merely an under-

standing that the employee should continue, though not bound to do so, in the service of his employer. A distinction, therefore, might be drawn on the ground that there was no existing obligation or interest to support the assignment. The distinction, however, has not been recognized, and the principal case is contrary to the general law. Assignments of future wages have been held valid, where there was an existing employment, even though the wages were not being earned under any special contract, but by the day or by the piece. *Thayer v. Kelley*, 66 Amer. Dec. 220 (Vt.); *Augur v. N. Y. Belting Co.*, 39 Conn. 536. Though such is the law it has been suggested that on grounds of public policy it is not well to allow an employee to assign away his future earnings, as such assignments lead directly to improvidence and profusion and often to hopeless poverty. *Woodring v. Lehigh R. R. Co.*, 2 Pa. Co. C. Rep. 465. An analogy is drawn also from the case of public officers, where assignments of this nature are generally held void, as tending to lessen the moral incentive to carry out efficiently the duties of their employment. As a matter of policy it may be well to restrict all employees from assigning away future earnings, but such a restriction, it would seem, is eminently a matter for legislative intervention and not a judicial question.

A FRENCH WILL AND AN ENGLISH MARRIAGE. — A point in conflict of laws upon which there seems to be no authority in the books, has been adjudicated in the English Court of Appeal. *In re Martin*, 1900, P. D. 211. In 1870, a Frenchwoman, residing in England but domiciled in France, made a will which was valid according to the French law, although it did not fulfil the requirements of the Wills Act. Some years later she married in London a native of France who had left that country to escape a sentence of imprisonment, and, as the majority of the court found, was then domiciled in England. Subsequently the husband returned to France and resumed his French domicile. The wife, however, remained in England, and on her death the will of 1870 was proposed for probate. The majority of the Court of Appeal, overruling the judgment of Jeune, P., held that the marriage of the testatrix to one who was then domiciled in England worked a revocation of her will. One judge, however, was not convinced that the Frenchman had ever changed his domicile, and consequently thought that the will had not been revoked. The state of facts surrounding the husband's life in England — he assumed an English name, took leases of property in England, and declared that he was domiciled there, although two years after the expiration of period of prescription as to his liability for imprisonment under the French law he returned to France — makes it difficult to quarrel with either view on the question whether or not he acquired an English domicile. Assuming that the majority were right, however, we have the decision that the English domicile of the husband at the time of the marriage revoked the will which the wife had previously made. Ordinarily the validity of a wife's will is to be determined by the law of the domicile of the husband at the time of her death. If that rule were to be followed here the will would be valid, as the evidence showed that the husband took up again his domicile of origin on his return to France, and by the French law a woman's will is not revoked by her marriage. Had the parties married in France and subsequently acquired an English domicile, the will would not then

have been revoked even if such English domicile continued till the wife's death, for by Lord Kingsdown's Act no will is to be held revoked or invalid by reason of any subsequent change of domicile. *In the Goods of Reid*, L. R. 1 P. & D. 74. Even had they married in England without acquiring an English domicile it is probable that there would have been no revocation. In the principal case, however, for a certain period the husband had an English domicile and during that period he married the testatrix. He had at that time submitted himself to the English law, and the English law says that the will of either spouse is revoked by marriage. The decision, therefore, although new upon the facts, is quite in accord with settled principles.

BONA FIDE PLEDGEES OF WAREHOUSE RECEIPTS. — The mere possession of goods is, of course, but uncertain evidence of the possessor's right to sell or pledge them. Where the goods are such as are often bailed for hire, such evidence is slight; where they are such as are seldom possessed except by those having a right to sell or pledge them, and their possession has been honestly obtained, it is well-nigh conclusive. Rights to possession, perhaps improperly, have been regarded by both business men and the courts as entitling their holder to be treated by strangers as one in actual possession. See 10 HARVARD LAW REVIEW, 57. Where such rights are evidenced, however, by bills of lading or warehouse receipts, business men ordinarily assume that their holder, if he has honestly come by them, is entitled not merely to have possession, but to possession coupled at least with the property of a mortgagee or with authority to sell or pledge. To be sure they often assume the same fact from mere possession of certain classes of goods, but they invariably assume it when such documents of title exist. And if a party advances money, in good faith, on the security of such documents, the business community seems to feel it to be just that he should be protected against an owner who has allowed such evidence of authority to be employed.

The courts, for the last century, have accepted a doctrine which, if properly applied, would recognize this business sense of justice. They have held that where an owner has given another party the apparent right to dispose of goods, or the *indicia* of their ownership, a *bona fide* purchaser or pledgee of such rights should be protected against the owner. By the latter's fault the purchaser was misled, and he should be estopped from affirming his rights. *Pickering v. Busk*, 15 East, 38; *Henderson & Co. v. Williams*, [1895] 1 Q. B. 521. But in applying this doctrine they have generally regarded bills of lading and warehouse receipts not as *indicia* of title or authority to dispose of the goods, but merely as *indicia* of a right to possession. *Newsom v. Thornton*, 6 East, 17, 41; *Burton v. Caryea*, 40 Ill. 320. Such a view may formerly have been proper, but at the present day, as these documents are considered by business men as representing a right to dispose of the goods, the courts should recognize the fact, and raise an estoppel against the owner who has intrusted them to another to a third party's disadvantage. In a recent Massachusetts case, the owner of goods, which were in a bonded warehouse, pledged them, and delivered to the pledgee a non-negotiable warehouse receipt. The pledgee in turn pledged the goods for a larger amount to the plaintiff. It was held that the plaintiff's rights were limited to the amount of the first pledge. *Commercial Nat. Bank v.*

Bemis, 58 N. E. Rep. 476 (Mass.). The case seems to be in accord with the general authority. *Stollenwerck v. Thatcher*, 115 Mass. 224; *Johnson v. Credit Lyonnais Co.*, L. R. 3 C. P. D. 32. In a few recent American decisions, however, the opposite, and more logical result has been reached. *Pollard v. Reardon*, 65 Fed. Rep. 848; *Miller v. Browarsky*, 130 Penn. St. 372.

In applying this doctrine — that an owner who misleads a *bona fide* purchaser or pledgee by giving to another apparent rights of ownership shall be estopped from asserting his rights — the question for the courts to decide is whether they shall refuse to apply it where the purchaser has been misled by bills of lading or negotiable or non-negotiable warehouse receipts, in accord with the majority of previous decisions, or shall hold that since these documents as a matter of fact give apparent authority to dispose of the goods, *bona fide* purchasers of them ought properly to be protected against owners who have placed them in the control of others. It is probable they will follow the former course, and not allow estoppel against the owner in such cases, especially as it is argued that since legislation is gradually caring for the matter, as is the case in Massachusetts, the desired result will thereby be reached without any expansion of the common law. This argument would have much force if it were true that any expansion were necessary; but the result may be attained merely by following the lead of a few American courts in making a proper use of a well-recognized doctrine.

CONTRACTS COLLATERALLY AIDING ILLEGAL ACTS. — When a contract expressly stipulates that either party shall do or aid in an illegal act, it is invariably held void. When it is an agreement which is proper in itself, but which has a tendency to promote some illegal act by providing the means by which such act may be accomplished, as by selling a house which the vendor knows is to be used as a house of ill-fame, the law is more in doubt. If the vendor actually participates in the illegal act, the contract is void. If the vendor merely knows that the vendee is to do an illegal act, but in no wise participates beyond providing the means, the law in America generally holds the contract valid, unless the act intended is a serious crime. *Tracy v. Talmage*, 14 N. Y. 162; *Hubbard v. Moore*, 13 Amer. Rep. 128 (La.); *Hanauer v. Doane*, 12 Wall. 342. In England, after much doubt, the courts seem to have adopted the view that all such contracts are invalid. *Pearce v. Brooks*, L. R. 1 Ex. 213.

In a recent American case, where furniture was provided certain parties, whom the vendor knew intended to use it in a house of ill-fame, under an agreement that they should finally purchase it, but under which the vendor might reclaim before sale, the contract was held void. *Standard Furniture Co. v. Van Alstine*, 62 Pac. Rep. 145 (Wash.). The rule regarding contracts for immediate sale, it was said, did not apply, as here the vendor became a mere bailor, and as he, therefore, retained the control of the goods, he participated in the immoral use to which they were put. The case was regarded as analogous to bailments for hire, and as such cases have seldom come before the courts, the decision is interesting. It is difficult to see how a bailor is more truly a participant in the illegal act than a vendor. In both cases the one party merely provides the means by which the other carries out his immoral purpose. The

power of recall which exists in the one case brings with it, to be sure, a continuing responsibility, but no participation, and the misconduct, if such exists, is equally in both cases the mere provision of means. As no valid distinction, then, can be drawn between contracts for bailment and contracts for sale, they should both come under the same rule. The difficulties are obvious which have led the American courts to adopt the general doctrine that all such contracts are valid. Many of the illegal acts thus collaterally aided are mere *mala prohibita*, acts involving slight moral turpitude, or even acts which it is doubtful a court will hold illegal, and it has, therefore, seemed too great a hardship in such cases to deprive one, who has suffered the disadvantages of a contract, of its benefits. Again, goods supplied are often both necessities and useful in an illegal trade, and were contracts for such supplies held invalid, certain persons might have difficulty in buying the necessities of life. On the other hand, if all such contracts are enforced, an easy method of preventing illegal acts by making it difficult to obtain means for their accomplishment is lost. If contracts furnishing necessities, or providing the means for acts which are merely *mala prohibita*, involving no moral turpitude, were held valid, and those collaterally aiding acts of a more serious nature, such as those in the principal case, invalid, the best results, under the circumstances, would be reached. This rule would involve much litigation until its limits were clearly defined. Such inconvenience, however, is a secondary consideration when a broader rule must result either in injustice or in the encouragement of illegal acts.

REASONABLENESS OF POLICE REGULATIONS. — There exists among some courts an unfortunate tendency to hold legislative action unconstitutional with too little regard for the scope of the power of the legislature and for the principles upon which the judiciary may declare its enactments void. This tendency appears in a recent decision in which the Supreme Court of Illinois held that a statute making it unlawful for any person not a registered pharmacist to compound or sell any medicines or drugs was, in so far as it limited the sale of patent medicines, unconstitutional. *Noel v. The People*, Chicago Legal News, November 24, 1900. It was impossible, said the court, to support such an enactment as a valid exercise of the police power, since it furnished no protection to the public health, for, registered pharmacists, not being required to analyze the medicines, would know no more about their properties, and would be no more discriminating in their sale than would other persons. Consequently the statute was said to deprive persons other than registered pharmacists of their liberty and property without due process of law.

That the state legislatures can provide for the protection of the public health, as one of the most important subjects under their so-called police power, is of course acknowledged. If private interests conflict with the legitimate exercise of this power they must give way before it; and, since it is a fundamental precept of civil government that every individual is subject to control in the interests of the many, the sufferer cannot in such case complain of being deprived of his liberty or property without due process of law. The action of the legislature, however, to be legitimate must be reasonable. But the test of reasonableness so far as a court in reviewing the action of the legislature deals with the question,

should not be based on the primary meaning of the word, but is rather in the nature of the test to be applied by a court in reviewing the verdict of a jury; the point to decide is whether or not it is reasonable to consider the action of the legislature reasonable. In other words, a court can declare a statute, passed ostensibly in the interests of the police power, unconstitutional in depriving a person of life, liberty, or property without due process of law, only when it can say that it is arbitrary and capricious, or that it cannot reasonably be calculated to attain its ostensible object. *State v. Vandersluis*, 42 Minn. 129. See 1 Thayer's Cases on Constitutional Law, 672.

Applying this test to the statute considered in the principal case, it would seem that the decision is an unjustifiable limitation of the legislature's field of action. It is of course within the police power of the state to regulate the exercise of professions and trades which are closely connected with the public welfare, and thus to prescribe conditions upon the fulfilment of which alone a person can practice such trade or profession. *Dent v. West Virginia*, 129 U. S. 114. The court admits that on this basis the statute is valid so far as it deals with the compounding of medicines, but insists that to limit to registered pharmacists the right to sell patent medicines does not tend to protect the public. Yet as a pure question of fact this finding is surely open to doubt. It is well known that many of these medicines contain unwholesome and dangerous ingredients, and that a too free access to them by ignorant people is a menace to their health. A registered pharmacist is one who has satisfied a body of experts that he has the knowledge and skill requisite to the conduct of his business, and that he is a person worthy of trust. It is reasonable to suppose that such a man will be more careful to understand the properties and effects of medicines he sells, and will use greater discrimination in their sale, than would a mere travelling drummer. At any rate, it is difficult to see how any court could hold that it was unreasonable to think that such a regulation could result in promoting the public health, or that it was arbitrary and unjust. In failing to apply this test the court has failed to recognize the true extent of legislative power. Similar statutes have generally been upheld. *State v. Forcier*, 65 N. H. 42; *State v. Heinemann*, 80 Wis. 253.

RECENT CASES.

AGENCY—ATTORNEY AND CLIENT—DISCONTINUANCE OF ACTION.—The plaintiff and the defendant made a collusive agreement for the discontinuance of a suit without costs, to which the defendant's attorney objected. Held, that the court may require the payment of the attorney's costs as a condition of discontinuance. *National Exhibition Co. v. Crane*, 54 N. Y. App. Div. 175.

This decision is in accord with the established rule in dealing with such cases. *Swain v. Senate*, 2 B. & P. N. R. 99; *Coughlin v. New York, etc. R. R. Co.*, 71 N. Y. 443. It is well settled that although an attorney has a lien for his costs on a judgment that has been obtained, he has none on the cause of action itself, and, therefore, if the discontinuance is made in good faith, the attorney can look only to his client for reimbursement. *Randall v. Van Wagen*, 115 N. Y. 528. But here there is a dishonest agreement to deprive him of his costs, and of the possibility of acquiring a lien upon the judgment. Consequently, on the ground of unfair practice, and in order to prevent a fraud on one of its officers, the court will allow him to proceed with the action against the defendant, who has joined in the attempted fraud, and if he wins,

will give judgment to the amount of the costs. *Basquin v. Knickerbocker Stage Co.* 12 Abb. Pr. 324. Thus, if the discontinuance is allowed in such cases it can only be on condition of the payment of costs to the attorney.

AGENCY—DEPOSIT OF CHECK FOR COLLECTION—LIABILITY FOR NEGLIGENCE.—The defendant bank forwarded to a correspondent bank a check deposited by the plaintiff for collection. *Held*, that the home bank is not liable for the laches of its correspondent bank. *Wilson v. Carlinville Nat. Bank*, 58 N. E. Rep. 250 (Ill.).

The decision is in line with earlier Illinois cases. *Etna Ins. Co. v. Alton City Bank*, 25 Ill. 243. The real question at issue is what contract the depositor made with the home bank, and there is a hopeless conflict of authority as to the inferences that should be drawn from the facts shown. Some courts hold that the home bank contracts to collect by means of its sub-agents, and is therefore liable for the agent's laches. *Allen v. Merchants' Bank*, 22 Wend. 215. As many others hold that the home bank agrees only to choose an agent for the depositor. *Dorchester Bank v. New England Bank*, 1 Cush. 177. In fact, however, in the vast majority of cases, the parties are merely following the usual business methods, having no clear conception of what contract they are making, and there is no reason to choose either view as expressing their intent. Accordingly the inquiry should be one of commercial expediency. The rule of the principal case, from this point of view, seems preferable, since the whole matter is settled by one suit, and business interests are on the whole better facilitated.

BANKRUPTCY—PREFERENCES—KNOWLEDGE OF DEBTOR.—An insolvent debtor, not knowing himself to be insolvent and intending no preference, made partial payments of debts in the regular course of business within four months of the commencement of bankruptcy proceedings. *Held*, that such payments are not preferences. *In re Smoke*, 104 Fed. Rep. 289 (Dist. Ct., N. Y.).

The Bankruptcy Act, § 60 a, provides that "a person shall be deemed to have given a preference, if, being insolvent, he has . . . made a transfer of any of his property, and the effect of the . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." It is well settled that a transaction of this nature will be a preference, even though the creditor acted innocently. *In re Fixon*, 102 Fed. Rep. 295; 14 HARV. LAW REV. 298. But the principal case makes a distinction when the debtor was ignorant of his insolvency, holding that this prevents the transaction from constituting a preference. The act, however, in its definition of a preference, is entirely silent as to the knowledge or innocence of either party. Thus the present construction seems an addition to the clear and unambiguous language of the statute, and is, therefore, not to be supported.

CARRIERS—GARNISHMENT.—Goods in the carrier's possession were consigned from a place within the state to a place without. *Held*, that, though the goods are still within the state, the carrier is not subject to garnishee process in a suit against the owner. *Baldwin v. Great Northern Ry. Co.*, 83 N. W. Rep. 986 (Minn.).

It is well settled that, under the ordinary statutes, a common carrier cannot be garnished, if at the time of serving process the property is out of the jurisdiction of the court. *Sutherland v. Second Nat. Bank*, 78 Ky. 250; *Western R. R. Co. v. Thornton*, 60 Ga. 300. But where this objection does not exist, a common carrier as well as any one else should be required to obey the summons. *Adams v. Scott*, 104 Mass. 164. There are, however, in accord with the principal case, a few decisions and numerous *dicta* which, on the ground of hardship to the carrier and inconvenience to the general public, exempt common carriers from the operation of the general language of garnishment statutes. *Stevenot v. Eastern Ry. Co.*, 61 Minn. 104; *Bates v. Chicago, etc. Ry. Co.*, 60 Wis. 296, 305. Such reasoning is unsatisfactory, especially since property in possession of a carrier is nowhere exempt from direct attachment. *Stiles v. Davis*, 1 Black, 101. Moreover, obedience to the garnishee process will not deprive the carrier of the profit intended to be derived from his contract with the shipper. *Rucker v. Donovan*, 13 Kan. 251. An opposite result in the principal case would, therefore, have been preferable.

CONFLICT OF LAWS—CORPORATIONS—NON-RESIDENT STOCKHOLDERS.—An insolvent Massachusetts corporation brought an action against stockholders resident in Nebraska, to enforce an assessment, which had been decreed by a Massachusetts

court, in a proceeding against the corporation alone. *Held*, that this decree is conclusive against the Nebraska stockholders as to the validity of the assessment. *Commonwealth, etc. Ins. Co. v. Hayden*, 83 N. W. Rep. 922 (Neb.).

At first sight this result might seem inconsistent with the rule, that a binding personal judgment cannot be obtained against a non-resident without service of process. *Pennoyer v. Neff*, 95 U. S. 714. But the validity of the assessment is clearly *res adjudicata* as to the corporation; and the true explanation of the principal case seems to be that stockholders are so closely identified in interest with and privy to the corporation, that a decree of assessment against the corporation is *res adjudicata* against them also. The rule that in an action to enforce a stockholder's statutory liability the stockholder cannot dispute a judgment against the corporation appears to rest on the same general principle. *Thayer v. New England Lith. Co.*, 108 Mass. 523. Furthermore, a contrary result would give rise to great practical inconvenience in winding up corporations. The principal case, therefore, reaches the desirable result, and is in accord with the weight of authority. *Hawkins v. Glenn*, 131 U. S. 319; *Mut. Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170; *Lehman v. Glenn*, 87 Ala. 618. *Contra*, *Lamar Ins. Co. v. Gulick*, 102 Ill. 41.

CONFLICT OF LAWS—DOMICILE—REVOCATION OF WILL.—A Frenchwoman made a will and subsequently married a Frenchman domiciled in England. The husband returned to France, but the wife remained in England and died there. *Held*, that the will was revoked by the marriage, and could not therefore be probated in England. *In re Martin*, [1900] P. 74. See NOTES, p. 379.

CONSTITUTIONAL LAW—BETTERMENT ACT—RETROACTIVE LAW.—In an action of ejectment, the defendant, a *bona fide* occupant, set off the value of improvements which he made upon the land prior to the passage of an act giving this right to such holders. *Held*, that the act is not unconstitutional under a state constitution prohibiting retroactive legislation. *Lay v. Sheppard*, 37 S. E. Rep. 132 (Ga.).

Equity early recognized the harshness of the common law rule which accorded to the *bona fide* occupant no rights whatever, and permitted him to recoup the value of his permanent improvements when he was sued for mesne profits. *Green v. Biddle*, 8 Wheat. 1. This, however, in many cases gave very inadequate relief, and hence in most states laws similar to the present have been enacted, and their constitutionality generally affirmed. *Ross v. Irving*, 14 Ill. 171. But where it has been sought to give these laws a retrospective effect, the courts have held either that such a result could not have been intended by the legislature, or in the alternative that the law was void. *Boyce v. Holmes*, 2 Ala. 54; *Society, etc. of the Gospel v. Wheeler*, 2 Gall. 104, 136. It is true cases may be found where such a law has been supported under constitutions containing no prohibition of retroactive legislation, *Albee v. May*, 2 Paine, 74, but this appears to be the first case so decided in the face of such a prohibition. The court reasons that, since on broad principles of justice the plaintiff is really not entitled to the improvements without paying for them, a law which takes away his undoubted legal right to have them unconditionally does not in reality invade any substantial rights. This reasoning is unconvincing, since the clear fact is that a vested legal right is taken away in direct contradiction to the terminology of the constitution.

CONSTITUTIONAL LAW—CONTEMPT—JUDICIAL POWERS.—A statute authorized certain ministerial officers to punish for contempt, the state constitution at the time empowering the legislature to establish new courts. *Held*, that as the power to punish for contempt is judicial, this statute was repealed by a new constitution vesting the judicial power of the state in certain courts thereby established. *Roberts v. Hackney*, 58 S. W. Rep. 810 (Ky.).

The power to punish for contempt is inherent in every court at common law, and its exercise is essentially a judicial function. Accordingly, this right in Parliament is expressly based on the judicial powers formerly exercised by that body. *Brass Crosby's Case*, 3 Wils. 188. Colonial legislatures, therefore, cannot exercise the power, *Kielley v. Carson*, 4 Moore P. C. 63, and our legislatures can do so only where the right can be derived from the constitution. *Burnham v. Morrissey*, 14 Gray, 226; *Kilbourn v. Thompson*, 103 U. S. 168. Furthermore, the better view is that legislatures cannot abrogate this judicial prerogative. 13 HARV. LAW REV. 615. The principal case is therefore undoubtedly correct, since the new constitution placed the judicial powers of the state beyond the control of the legislature. The court might, however, have rested their decision upon the broader ground that the

power to punish for contempt is so inseparably connected with the exercise of general judicial powers that the legislature cannot confer it upon any body whose other proceedings are not of a judicial nature. *Whitcomb's Case*, 120 Mass. 118.

CONTRACTS—AGREEMENT NOT TO SUE—PUBLIC POLICY.—In a civil action for the pollution of a stream, amounting to a public nuisance, the defendant set up a contract by the plaintiff not to sue for such pollution. *Held*, that the contract is void as against public policy. *Western Paper Co. v. Comstock*, 58 N. E. Rep. 79 (Ind.).

There seems to be no direct authority on this point. A contract not to bring a civil suit is not void merely because the injury is also a crime. *Wells v. Thompson*, 50 Ala. 83; *Dodson & Payne v. McCauley*, 62 Ga. 130. So long as the prosecution of the crime is not touched upon, the parties should be allowed to settle their private claims as they see fit. The agreement in question, however, includes damage to be suffered in the future by the maintenance of the nuisance, and thus may be said to contemplate the future commission of an indictable offence. In general contracts of this latter nature might well be considered against public policy. Similarly, a contract stipulating for partial immunity from liability for future offences against a person's good name has been held void because of immorality. *Hayes v. Hayes*, 8 La. Ann. 468. Nevertheless, these considerations of policy seem scarcely to apply to the continuance of a public nuisance, which involves no particular immorality, and is in its nature not an ordinary crime, but a mere public tort. *Queen v. Stephens*, L. R. 1 Q. B. 702. An opposite decision in the principal case would, therefore, be preferable.

CONTRACTS—EXCHANGE OF LAND—BROKER'S COMMISSION.—An owner of land employed a broker to secure an exchange. The broker procured a party with whom the employer entered into a binding contract. *Held*, that although the party failed to consummate the exchange, the broker is entitled to his commission. *Roche v. Smith*, 58 N. E. Rep., 52 (Mass.).

This decision is in accord with what seems the universal rule in this country. *Kalley v. Baker*, 132 N. Y. 1; *Wray v. Carpenter*, 16 Colo. 261. The case is interesting, however, because of the clear statement by the court of the principles involved. The broker has not fulfilled his contract, since no exchange was secured; but as the principal has accepted the customer by entering into a binding contract with him, the broker is held to be excused thereby from further duty. The broker must of course act in good faith, or he cannot recover. *Burnham v. Upton*, 174 Mass. 408. If the employer refuses to contract until he examines the title, which proves defective, or if he makes a contract, to be determined if the title is not good, in the opinion of the court, he should not be liable to the broker. But, by entering into a binding contract, he either secures the land or a right of action on the contract to compensate him for his loss through its breach, and he should therefore pay for the services which obtained him these rights.

CONTRACTS—ILLEGAL CONTRACTS—COLLATERALLY AIDING AN IMMORAL PURPOSE.—The plaintiffs bailed furniture knowing it was to be used in a house of ill-fame, the agreement providing for a future sale unless the plaintiffs previously reclaimed. *Held*, that the contract is void as against public policy. *Standard Furniture Co. v. Van Alstine*, 62 Pac. Rep. 145 (Wash.). See NOTES, p. 381.

CONTRACTS—STATUTE OF LIMITATIONS—SUNDAY LAW.—The defendant being indebted to the plaintiff, one X, by consent of the plaintiff, agreed with the defendant on Sunday that the defendant should do certain work for X, and that X should pay the compensation to the plaintiff on the defendant's account. This agreement was afterward completely carried out on a week day. A statute forbade the doing of business on Sunday. *Held*, that since the agreement made on Sunday is void, X had no valid authority to pay the money to the plaintiff, and the payment therefore does not interrupt the running of the Statute of Limitations against the original debt. *Pillen v. Erickson*, 83 N. W. Rep. 1023 (Mich.).

The court argues correctly that the defendant was never bound to permit payment to the plaintiff of the money which became due from X. But this does not conclude the question whether there was in fact a valid part payment on the old debt, which would of course interrupt the running of the statute. *Wesner v. Stein*, 97 Pa. St. 322. It is hard to see why the Sunday transaction, though creating no obligation whatever, did not amount to an authority to pay the money to the plaintiff. A bare authority whenever given would of course be revocable, but it was not revoked here. To deprive

a payment actually made in pursuance of such an authority of its ordinary legal significance, because the authority was given on Sunday, is to give to the Sunday statute an unusually sweeping interpretation. There seems to be no case exactly in point, but in several cases analogous transactions on Sunday, not amounting to contracts, have been given full legal effect. *Tuckerman v. Hinkley*, 9 Allen, 452; *Beardsley v. Hall*, 36 Conn. 270; *Riley v. Butler*, 36 Ind. 51. The principal case seems, therefore, to be incorrect.

CRIMINAL LAW — FORGERY — CHARACTER OF INSTRUMENT. — By an *ultra vires* resolution of a board of county commissioners, a bounty was offered for the killing of gophers, and the certificate of the township clerk as to the number killed was made the basis on which the auditor's warrant was to be issued. *Held*, that such certificate is not the subject of forgery. *State v. Ryan*, 83 N. W. Rep. 865 (N. D.).

The principal case limits the scope of the crime of forgery considerably. It is true the court does not go so far as to say that no instrument can be the subject of forgery where its invalidity, even if it is genuine, depends on a question of law, but relies on the point that in the present case there was clearly no legal enforceable liability on the county, since it is well settled that counties have no such power as was here attempted to be exercised. Assuming that this is as well settled as is claimed, is the tendency of the forged instrument to deceive the county officers thereby diminished? Is it fair to suppose that a county which has agreed to rely on township clerks' certificates will not be deceived by the false making of such certificates? The soundness of the case may, therefore, well be doubted, and some authority has been found which tends to support an opposite conclusion. *People v. Munroe*, 100 Cal. 664; *State v. Eades*, 68 Mo. 150.

DAMAGES — DETENTION OF PERSONAL PROPERTY — MITIGATION OF SPECIAL DAMAGES. — In an action for detention of corn plaintiff claimed as special damages the loss of a sale at the highest market value during the period of detention. *Held*, that it was error to exclude defendant's evidence that within thirty days after the corn was returned, while the plaintiff still held it, and before the action was commenced, its market value was as high and its sale as feasible as during the detention. *Hoyt v. Fuller*, 104 Fed. Rep. 192 (C. C. A., Eighth Cir.).

This precise question seems not to have arisen before. In an action for unlawful detention the measure of damages is ordinarily the value of the use of the property while detained. *Cook v. Hamilton*, 67 Iowa, 394. But where, as in the principal case, the property is of such a character that the value of its use amounts to nothing, this measure cannot be adhered to. *Lumber Co. v. Spencer*, 81 Iowa, 549. Hence the plaintiff claimed the benefit of the rule adopted in some jurisdictions in actions of trover, that, where the property converted is subject to fluctuations in value, the measure of damages is the highest market value of the property within a reasonable time after conversion. *Galigher v. Jones*, 129 U. S. 193. If this rule is to be supported at all, it must be on the ground that it is an application of the basic principle that actual compensation is the true measure of damages in all cases. But it is obvious that where the defendant's evidence shows that the plaintiff did not in fact suffer the damage claimed, the reason for applying the rule falls. Hence the principal case, in admitting evidence to this effect, reaches a sound conclusion.

EQUITY — SEALED INSTRUMENTS — CONSIDERATION. — *Held*, that in a bill in equity to enforce a sealed instrument it is not necessary to allege a consideration, but that it is for the defendant to show want of consideration. *Mills v. Larrance*, 58 N. E. Rep. 219 (Ill.).

This decision applies in equity what is said by the court to be the common law rule, that a seal is presumptive evidence of consideration. The Wisconsin case relied upon for that rule is based upon a statute and does not represent the common law. *Carey v. Dyer*, 97 Wis. 554; Wis., REV. ST. § 4195. Aside from statute, a seal is said to import a consideration. This, however, means simply that a sealed instrument requires no consideration, as is shown by the fact that a sealed promise is enforceable, even though gratuitous. *Bunn v. Guy*, 4 East, 190, 200; *Ducker v. Whitson*, 112 N. C. 114. But it is well settled that equity will not grant specific performance of a sealed instrument unless there be an actual consideration for it. *Tatham v. Vernon*, 29 Beav. 604. Consequently it seems clear on principle that it is for the plaintiff in equity to allege and prove consideration in cases where the bill is founded upon a sealed as well as upon an unsealed instrument, for otherwise his bill does not show such facts as entitle him to relief.

EQUITY — SPECIFIC PERFORMANCE — STATUTE OF FRAUDS. — The plaintiff agreed to give the defendant a mortgage on certain land in consideration of the latter's oral promise to give him a release of another mortgage and to pay him a sum of money. The plaintiff gave defendant the mortgage, and received the money, and now brings a bill for specific performance of the promise to release. *Held*, that he has so changed his position as to take the case out of the Statute of Frauds, and that specific performance should be granted. *Gross v. Milligan*, 58 N. E. Rep. 471 (Mass.).

The rule is well established that, where there has been such part performance of a contract that it would be a fraud on the plaintiff if it is not completed, specific performance will be granted notwithstanding the defence of the Statute of Frauds. *Potter v. Jacobs*, 111 Mass. 32; *Parkhurst v. Van Cortland*, 14 Johns. 15. If the plaintiff has no other remedy but an action at law, this rule is clearly applicable, *Walker v. Walker*, 2 Atk. 98, 100 (*semble*), and it seems to have been assumed in such cases that the only alternative, namely, an order that what had been done should be undone, could not be given, even though it would have restored the plaintiff to his original position. *Tilton v. Tilton*, 9 N. H. 385 (*semble*). In the present case the parties might have been put *in statu quo* by the cancellation of the deed, and the return of the money received. This relief would be analogous to the cancellation of a deed obtained by fraud, *Thompson v. Graham*, 1 Paige, 283, and would be preferable to that given here, since it would not be in conflict with the provisions of the statute. Apparently, however, such a course has never been followed.

JURISDICTION — ELECTIONS — PARTY NOMINATIONS. — A regularly called county convention of a party made nominations for county offices. Later, its delegates to a state convention joined a bolt, whereupon the state convention recognized and admitted a rival delegation and authorized it to call another county convention, which met and made new nominations. *Held*, that the nominees of the first convention must go on the ballot as the regular candidates of the party. *State ex rel. Kennedy v. Martin*, 62 Pac. Rep. 588 (Mont.).

Political parties are now recognized by law and exercise important public functions, but the courts have been timid in subjecting them to legal control. Thus, where two persons claim the nomination by a local convention the courts accept the decision of the state authorities of the party. *Moody v. Trimble*, 58 S. W. Rep. 504 (Ky.). Likewise, where two district conventions claim to represent the party, the decision of the state convention has been held conclusive, though opposed to a previous adjudication of the courts. *In re Woodworth*, 16 N. Y. Supp. 147; *In re Pollard*, 25 N. Y. Supp. 385. Apparently it would follow naturally from these cases that the decision of the national party authorities between rival state conventions would be binding, but it is doubtful if any court would go so far. Indeed, in one case recognition by the national authorities seems to have been ignored, the court, however, resting its decision on other grounds. *Phelps v. Piper*, 67 N. W. Rep. 735 (Neb.). Furthermore, a nomination by delegates not representing the whole district has been held irregular. *State v. Weir*, 31 Pac. Rep. 417 (Wash.). Yet, it is hard to see why this is any more objectionable than the control of such nominations by delegates from outside the district. Moreover, it has been held that, at least in the absence of a decision by the state party authorities, the courts will decide what organization represents the party in a particular place. *In re Supervisors of Election*, 9 Fed. Rep. 14. Although there are strong practical reasons why the courts should refrain from dealing with purely political questions where possible, a fair interpretation of the ordinary statutes seems to impose upon them the responsibility of deciding on this whole class of cases. The principal case, therefore, together with the few other cases quoted, where the courts have shown a similar tendency, is to be commended.

PERSONS — MORTGAGE BY INFANT — AVOIDANCE. — The plaintiff, while an infant, purchased land, and on the next day mortgaged it to the defendant to secure money advanced by him for the purchase price. Subsequently the latter took possession of the premises for breach of a condition in the mortgage deed. On attaining majority, the plaintiff sought to avoid the mortgage and obtain possession of the premises. *Held*, that as the purchase and the advance were one and the same transaction, the plaintiff cannot repudiate one part and affirm the other. *Thurston v. Nottingham, etc. Society*, 17 Times L. R. 7 (Ch. D.).

Where an infant purchases land and gives his grantor a mortgage back to secure the price, the two conveyances are treated as one contract; and hence the infant cannot affirm or avoid one conveyance without affirming or avoiding the other. *Hubbard*

v. *Cummings*, 1 Me. 89. The principal case applies the same doctrine where the infant's grantor and the mortgagee were, apparently, different persons. By making the infant's right to avoid the mortgage conditional upon his avoidance of the original conveyance all parties are put *in statu quo*. For the infant may recover the consideration he gave for the original conveyance, *McCarthy v. Henderson*, 138 Mass. 310, and as this consideration represents the mortgagee's advance, the infant, in seeking the aid of equity, must do equity by restoring the mortgagee to his original position. *Hillyer v. Bennett*, 3 Edw. Ch. 222. The decision in this last case, as well as that of the principal case, if not absolutely inconsistent with, at least is an exception to the rule which limits the adult's recovery to such part of the consideration only as the infant retains in specie. *Miller v. Smith*, 26 Minn. 248. The result is, however, obviously just, and is supported by some authority in this country. *Dana v. Combs*, 6 Me. 89.

PERSONS — TRESPASS — POSSESSION BY WIFE. — During the temporary absence of the plaintiff's husband, the defendant committed a trespass in the husband's house. *Held*, that the plaintiff had sufficient possession to maintain an action of trespass. *Ford v. Schliessman*, 83 N. W. Rep. 761 (Wis.).

At common law actual possession by the wife constituted legal possession by the husband. *Bell v. Bell*, 37 Ala. 536. Since, therefore, the wife had no legal possession, she was unable to bring an action of trespass. Cf. *Lamb v. Swain*, 3 Jones, N. C. 370. The principal case is thus clearly a departure from strict principle. The court mentions no statute as a basis of its decision. The explanation, however, may perhaps be found in the changed position of married women under modern legislation. They are now treated in general so nearly on an equality with men in the rights given them that, even in the absence of a statute on the exact point, a court might feel justified in holding that a married woman to-day is capable of legal possession. Likewise a natural desire of the judges not to turn out of court, on a technical point of procedure, a plaintiff who had a good cause of action may well have affected the decision. At all events, the result seems eminently just, and in accord with the present policy of the law.

PROPERTY — CONSTRUCTIVE POSSESSION — TRESPASS. — The plaintiff was in actual occupation of a portion of a lot of land under a deed of the whole. The defendant committed a trespass upon a part not actually occupied by the plaintiff. At the trial the plaintiff failed to prove a good title. *Held*, that the plaintiff had not such possession as would sustain an action of trespass. *Ault v. Meager*, 37 S. E. Rep. 186 (Ga.).

This decision places a novel limitation upon the doctrine of constructive possession. Where partial possession has been taken under a valid deed it is everywhere agreed that there is constructive possession of the whole in no way differing from actual possession. Litt. § 417, 418. *Gardner v. Gooch*, 48 Me. 487. In America this principle has been extended so that partial possession under mere color of title for the statutory period confers a good title to the whole. *Coleman v. Billings*, 89 Ill. 183; *Jackson d. Hasbrouck v. Vermilyea*, 6 Cowen, 677. Whether such possession for a less period is also sufficient to support an action of trespass appears never before to have been decided. A strong *dictum*, however, has been found contrary to the decision of the principal case. *Ralph v. Bayley*, 11 Vt. 521. On principle there appears to be no reason for a different result in the two cases. The reasons of public policy which justify the American doctrine in the one case apply equally in the other. Moreover, the present decision reaches this absurd result, that while the occupant has possession against the true owner, he has no possession at all against the mere trespasser.

PROPERTY — LITTORAL LAND — RIGHT TO ACCRETION. — Plaintiff was the owner of littoral land which the ocean gradually washed away until the high water mark reached the defendant's land. Then the ocean gradually receded leaving a strip of alluvial land. *Held*, that all accretions beyond the defendant's original line go to the plaintiff. *Ocean City Assoc. v. Shriver*, 46 Atl. Rep. 690 (N. J., C. A.). See NOTES, p. 376.

PROPERTY — STATUTE OF LIMITATIONS — TITLE TO LAND. — One X occupied certain land by permission of the owner, paying no rent, and remained in possession for twenty years after the land had been conveyed to a stranger, without knowledge of the conveyance and claiming to hold under the permission originally given. *Held*, that the Statute of Limitations did not run in his favor. *Bond v. O'Gara*, 58 N. E. Rep. 275 (Mass.). See NOTES, p. 374.

PROPERTY—SURFACE WATERS—INCREASED FLOW UPON ADJACENT LAND.—Defendant constructed a system of drainage entirely upon his own land, as a result of which the flow of surface water upon plaintiff's land was increased. *Held*, that the plaintiff has no cause of action. *Connell v. Stark*, 83 N. W. Rep. 1092 (Wis.).

In some jurisdictions the civil law rule prevails, that the lower owner is bound to receive the natural flow of surface water. *Martin v. Riddle*, 26 Pa. St. 415. Under such conditions, an increase of flow creates a greater burden and should give a right of action. *Miller v. Laubach*, 47 Pa. St. 154. But in most states the common law rule is adopted which allows the lower owner to prevent the influx of surface water upon his land by erecting structures at the upper extremity. *Walker v. Southern Pacific R. R. Co.*, 165 U. S. 593, 602; 11 HARV. LAW REV. 65. In these jurisdictions, the lower owner is ordinarily amply protected by this right against all damage from surface water, and he is usually allowed no right of action. *Gannon v. Hargadon*, 10 Allen, 106; *Goodale v. Tuttle*, 29 N. Y. 459, 467. *Contra*, *Adams v. Walker*, 34 Conn. 466. As the law of surface waters is so largely arbitrary and free from decisive principles, the chief aim in dealing with it should be to secure uniformity, and the decision in the principal case is, therefore, to be supported.

PROPERTY—WILLS—REVOCATORY CLAUSE INSERTED BY MISTAKE.—A testator inserted a revoking clause into a will disposing of some property left undisposed of by an earlier will. This clause was introduced under a mistaken impression as to its effect and did not represent the testator's wishes. *Held*, that both documents should be probated and the words of revocation omitted. *Marklem v. Turner*, 17 Times L. R. 10 (P. D.).

There being no jurisdiction for the reformation of wills, the form of the will, as it stands at the time of execution, is on principle conclusive. *Stanley v. Stanley*, 2 J. & H. 491. The English probate courts, while admitting that inadvertent omissions cannot be remedied, have in some cases allowed parts of a will which were mistakenly introduced without the testator's knowledge to be struck out on probate. *Goods of Oswald*, L. R. 3 P. & D. 162; *Morrell v. Morrell*, 7 P. D. 68. The power to do this has, however, been expressly denied in cases where the contents of the will were brought to the notice of the testator at the time of execution. *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109. The principal case, therefore, where the testator necessarily knew of the revocatory clause, since he inserted it himself, goes far in the wrong direction and is opposed to an earlier English case, *Collins v. Elstone*, [1893] P. 1. In accord, however, see *In re Purdy's Will*, 20 N. Y. Supp. 307. Such mistakes must be remedied, if at all, in construing the instrument, but it would have been difficult even in that way to override the express revocatory clause in the present case.

SALES—WAIVER OF DEFECTS.—The plaintiff ordered from the defendant wheat of a certain description, and, before it arrived, paid for it, receiving the bill of lading. *Held*, that the plaintiff has not waived his right to recover damages for the failure of the wheat to answer the description in the contract. *Munford v. Kevill*, 58 S. W. Rep. 703 (Ky.).

It has also been held in Kentucky that an acceptance of defective goods was a waiver of any right of action for defects, on the ground that it is an agreement that the quality is satisfactory. *Jones v. McEwan*, 91 Ky. 373. When the defects are obvious there is considerable authority elsewhere to the same effect. *Gaylord v. Allen*, 53 N. Y. 515. The better view, however, would seem to be that such an acceptance is really nothing more than a waiver of the buyer's right to reject the goods, and not of his right to sue for damages. *Underwood v. Wolf*, 131 Ill. 425; *Morse v. Moore*, 83 Me. 473. The principal case, therefore, is correctly decided according to the preferable rule. It is not, however, inconsistent with the extreme view that acceptance is to be interpreted as an agreement as to quality, since this cannot possibly be true where there has been no opportunity for inspection.

SALES—WAREHOUSE RECEIPTS—RIGHTS OF A SECOND PLEDGEE.—The defendant, owner of goods stored in a warehouse, pledged them to one X, giving him a non-negotiable warehouse receipt running to him. X in turn pledged them for a larger sum to the plaintiff, who was ignorant of the previous transaction, giving him a similar receipt. *Held*, that the plaintiff's rights against the owner are limited by the amount of the first pledge. *Commercial Nat. Bank v. Bemis*, 58 N. E. Rep. 476 (Mass.). See NOTES, p. 380.

SURETYSHIP — STATUTE OF FRAUDS — CONSIDERATION. — The defendant's husband died, owing the plaintiff for goods purchased, and after his death, the defendant, without obtaining a transfer of the property, assumed control of the business. The plaintiff then agreed to leave the goods with her and to continue to sell to her on credit in consideration of her oral promise to assume her husband's indebtedness. *Held*, that this agreement is unenforceable within the Statute of Frauds. *Cardeza v. Bishop*, 54 N. Y. App. Div. 116.

According to the preponderance of authority, an oral promise to pay the debt of another, when founded upon a new consideration moving to the promisor and beneficial to him, is not within the Statute of Frauds. *Mallory v. Gillett*, 21 N. Y. 412. On principle, however, this position is objectionable in that it reads into the statute an exception not actually enacted. *Allen v. Thompson*, 10 N. H. 32. This being true, the rule in question should be applied strictly, and in order to invoke its aid, the consideration should be of actual benefit to the promisor. Here the possibility of such benefit is too remote. If it had appeared that there were no other claimants against the estate and that the promisor would ultimately be entitled to the goods, the result might be different. But the case as made out by the plaintiff is no more than a promise to a creditor to pay the debt of another, in consideration of mere forbearance by the creditor. Such a promise is universally held to be within the Statute of Frauds. *White v. Rintoul*, 108 N. Y. 222. The decision in the principal case, therefore, is clearly sound.

TORTS — LEGAL CAUSE — INSTINCTIVE ACT. — The plaintiff, while employed in the defendant's shop, was injured by stepping into a barrel of hot water sunk in the ground, and he claimed that the accident was caused by the conduct of the defendant's vicious dog. The jury was instructed to find for the plaintiff if the acts of the dog were of a character to induce in a reasonable man such alarm as would cause him to forget the presence of the barrel and involuntarily step into it. *Held*, that the charge was erroneous, and the plaintiff can recover only if he proves that the defendant was negligent in placing and maintaining the barrel. *Meyer v. Boepple Button Co.*, 83 N. W. Rep. 809 (Iowa).

It is difficult to understand the view taken by the higher court. The need of proving *scienter* having been removed by statute, the plaintiff should be entitled to recover if acts of the dog in the nature of an attack, and not provoked by any fault of the plaintiff, constituted the legal cause of the damage. *Dennison v. Lincoln*, 131 Mass. 236. It is, moreover, clear that the causal connection is not broken by an instinctive act of the plaintiff, caused by an alarming situation for which the defendant is responsible, at least where the situation is such that the average man would be likely so to act. *Gannon v. New York, etc. R. R. Co.*, 173 Mass. 40; *Coulter v. American, etc. Co.*, 56 N. Y. 585. In this view of the case, which seems to have been that of the trial court, the defendant's negligence in regard to the barrel would be wholly immaterial. The decision holding such negligence essential appears, therefore, incorrect.

TORTS — LEGAL CAUSE — PROBABLE CONSEQUENCE. — The defendant's engine, through the negligence of the engineer, struck a person at a crossing and hurled his body against the plaintiff, who was standing on the platform of defendant's station near by. *Held*, that the defendant's negligence is not the legal cause of the injury. *Evansville, etc. R. R. Co. v. Welch*, 58 N. E. Rep. 88 (Ind.). See NOTES, p. 377.

TORTS — PROPERTY — NUISANCE. — *Held*, that an owner of land is entitled to build stables thereon in the manner best suited to his business, and such stables, if conducted in a reasonably proper manner, do not constitute a nuisance for which damages may be recovered by adjoining property owners. *Harvey v. Consumers' Ice Co.*, 58 S. W. Rep. 316 (Tenn., Sup. Ct.).

This decision is based by the court upon a rule of equity that a stable is not *prima facie* such a nuisance as will warrant an injunction against its erection. *Kirkman v. Handy*, 11 Humph. 406; *St. James Church v. Arrington*, 36 Ala. 546. See *contra*, *Coker v. Birge*, 9 Ga. 425; *Aldrich v. Howard*, 7 R. I. 87. But whether an injunction will issue to prevent such a possible future tort or not, in determining the present existence of a nuisance, the court should not merely consider whether, from the defendant's point of view, the use of his property is suitable and reasonably proper for the carrying on of his business, but should also look at the effects upon neighboring property, and decide whether the place is a proper location for such a business. The decision in the principal case, therefore, is wrong in theory, and it is unsupported by authority. *Dargan v. Waddill*, 9 Ired. 244; *Burditt v. Svenson*, 17 Tex. 489.

TRUSTS—INSURANCE—MURDER OF INSURED BY BENEFICIARY.—The beneficiary in a benefit certificate of insurance murdered the insured. The administrator of the insured sued on the policy. An assignee of the beneficiary intervened. *Held*, that since the company was a trustee of the money payable on the certificate for the beneficiary her crime barred all actions by her or her assignee and a resulting trust for the administrators of the insured arose. *Schmidt v. Northern Life Assoc.*, 83 N. W. Rep. 800 (Iowa). See NOTES, p. 375.

TRUSTS—INVESTMENTS BY TRUSTEES—LIABILITY FOR LOSS.—A testator, in creating a trust, directed his trustees to invest the funds in any securities which they might deem beneficial to his estate. They invested in the stock of a corporation organized to engage in manufacturing, but having no plant and no established business. *Held*, that this is beyond the scope of their authority, and they are therefore liable for the loss resulting. *In re Hall*, 58 N. E. Rep. 11 (N. Y.).

In England, in the absence of directions by the testator, trustees are allowed to invest only in government securities or in first mortgages on real estate. *Hancom v. Allen*, 2 Dick. 498; *Clough v. Bond*, 3 Myl. & C. 490, 496. This rule has been adopted in some of our states. *King v. Talbot*, 40 N. Y. 76; *Hemphill's Appeal*, 18 Pa. St. 303. In others, however, no particular investments are prescribed, but the trustee must act faithfully and with sound discretion. *Harvard College v. Amory*, 9 Pick. 446; *Mattocks v. Moulton*, 84 Me. 545. Even where the trustees, as in the principal case, are given by the terms of the will unlimited choice in their investments, they should still use a sound discretion. *Clark v. Garfield*, 8 Allen, 427. Such discretion is that which prudent men would exercise in the management of their own affairs, not with reference to speculation, but with a view to the permanent disposition of funds. *Harvard College v. Amory*, *supra*; *Kimball v. Reding*, 31 N. H. 352. The investment in the principal case is clearly speculative in nature, and the decision is therefore unquestionably correct.

REVIEWS.

AMERICAN LAW. A Treatise on the Jurisprudence, Constitution, and Laws of the United States. By James Dewitt Andrews. Chicago: Callaghan & Co. 1900. pp. cxii, 1245.

There are, it is conceived, three possible varieties of treatise on the *corpus juris* of America. Historically the method and purpose of Blackstone and Kent take precedence. They purported to place within a single work an authoritative statement of the law in all its parts. Both these authors pursued the method followed by Glanvil, Bracton, Coke, and Hale, and assumed that the only serviceable works on the laws of England were those which treated the whole of its jurisprudence. In adopting this system they all took as a model Justinian's Institutes and Code. What may be denominated the second class of works on the whole body of the common law is that to which the volumes by Walker and by Russell belong. They are hardly more than a course of lectures thrown into the form of a text-book. The third sort of treatise is best exemplified by Savigny's *Geschichte des Heutigen Römischen Rechts*. Such a work aims to show the history and genesis of the law in all its parts, and is characterized by a close historical analysis of the relation existing between those various subdivisions. As the law stands in America, the first class of treatise has passed away in deference to the works on special topics. The second is useful only to the student of the elements of the law. Of the three varieties the last is the only one which can be of any service to us, and it ought not to be attempted until the various por-

tions of our jurisprudence have undergone a much more thorough historical investigation. Even if the material for this work were at hand no one should essay to place it in coherent form unless he has spent a lifetime of study in preparation. These requirements account sufficiently for the fact that there is as yet no example of this class in the domain of the common law, and demonstrate fully why no satisfactory treatise will be forthcoming for many years.

The present volume, if it belong to the first class, is obsolescent if not obsolete. It is designed to satisfy a want better satisfied by works on special topics. Even if it were admitted that Professor Andrews has excelled Blackstone in his own sphere, still that furnishes no conclusive reason why the more modern work should prove invaluable. Blackstone and his method belong to the time that has passed. When he was read it was because his book was the best exemplification of what was then the only existing method, namely, that of treating the whole body of the law in one work, and not because his method was the best method. To-day his system has been superseded by one more enlightened. For an authoritative text of the law of contracts or property we go to volumes devoted to the treatment of those particular subjects. It sounds like stating a self-evident proposition to assert that any text book which takes for its model a system discarded as inefficient is bound in the nature of things to be disregarded and remain unread, no matter how perfectly the erroneous method has been set forth. The pretensions of the volume under discussion exclude it from the second class, and if it is intended to stand beside Savigny's "History" it is premature.

The author, however, has, and it is submitted correctly, devoted much of his labor and time to classifying and arranging the topics of the common law. This is the first and most indispensable requisite of any treatise on the *corpus juris*. The classification adopted is in the main desirable and well-considered, though perhaps the proposed alteration in existing phraseology is to be deplored. Another rule of great importance, which ought to be observed in this as in every other text-book, is that which bids the author let the fulness and length of treatment accorded the various topics be in proportion to their relative importance. This rule Professor Andrews has entirely disregarded. Hundreds of pages are devoted to one subject, while another topic hardly less important is allowed scarcely a hundredth part of that space. Procedure and constitutional law claim a large fraction of the volume, while international law is wholly omitted, and the entire body of the criminal law is dismissed in three pages. This lack of any sense of proportion seems unpardonable.

The style, especially in the parts devoted to constitutional law and evidence, is singularly clear and condensed. In some portions of the book, however, the sentences seem crude and unfinished, and appear to indicate that the labor was hurriedly done. Though the law is usually stated correctly, there are several instances in which the principles laid down as undoubted are, if not absolutely erroneous, still of questionable correctness. This fault may be observed in § 390, dealing with the ability of a court to consult the journals of the legislature when it passes on the constitutionality of a law; in § 386, where the limits of legislative power are stated; and in the definitions of a conditional limitation (p. 1002) and of a base fee (p. 978.)

The introduction to the volume under discussion is devoted to the

treatment of the fundamental propositions underlying the theory of government. The main body of the work is divided into the law relating to persons and that relating to things (or property). Under the law of persons the author discusses the theory of rights and remedies, the law of our constitution, the law of corporations, personal rights, and domestic relations. Things are divided into those personal and those real. Under the sections devoted to the former the writer gives us a short abstract of those topics which include the great part of the civil branch of our jurisprudence. The law of actions is next treated. Under this head are included the rules of evidence. The last in order is the law of crimes.

To him who desires a knowledge of the very elementary parts of the law some portions of this book will be useful. But to the thorough student it is absolutely valueless, and to the practicing lawyer it will be of little service. In conclusion, it may be deplored that one possessing the author's clearness of expression and great erudition should have so far mistaken the needs of the present day as to take as his model a method and a text-book now obsolete.

H. F.

THE PEACE CONFERENCE AT THE HAGUE. And its Bearings on International Law and Policy. By Frederick W. Holls, D. C. L. New York: The Macmillan Co. 1900. pp. xxix, 573.

The object of this work is to place the story of the Hague Conference and a description of its work before the general reader as well as the student of international law. After a discussion of events leading up to and including the opening session, there is given a detailed account of the work of the three committees into which the conference was divided. Following an interesting statement of the attitude of the United States concerning the immunity of private property on the high seas and other general topics, the body of the work concludes with a consideration of the bearings of the conference on international law and policy. The appendices contain the text, in French and in English, of the final act, the treaties, and the declarations adopted by the conference; the reports of the American commissioners to their government; and an account of the Grotius celebration at Delft.

While there appears in the rescript of the Emperor of Russia no intention to discuss measures for disarmament, many have felt that the conference was a failure in not providing for the limitation of future armament. Before beneficial results have been exemplified, it is not likely that many will take so optimistic a view of the work of the conference as Mr. Holls avowedly does; nevertheless, the results actually achieved must not be slighted. The adoption to maritime warfare of the principles of the Geneva Convention (1864) is probably of even greater importance than the author contends. The same is true of the revision of the regulations respecting the laws and customs of war on land, as embodied by the Brussels Conference (1874), but never before ratified. In the opinion of Mr. Holls the substantial achievement of the conference was the result of the work of the third committee — the convention for the peaceful adjustment of international differences. But, as the author realizes, the beneficial results of this convention depend entirely upon public opinion. For, all that is provided is a machinery for settling those differences which contending nations may be willing to submit to adjudication. Hence the

statement that this convention is "the Magna Charta of International Law" is probably too strong. The status of international law resulting from the Hague Conference resembles more nearly the condition of early Anglo-Saxon law, before compulsory judicial proceedings were recognized. POLLOCK AND MAITLAND, HIST. OF ENG. LAW, vol. 1, p. 14. The international recognition of arbitration is an important step towards the peaceful settlement of international differences; but it is only a preliminary step that must be followed by something more substantial.

Almost all that is contained in the main part of the work can be secured from the treaties adopted and from the reports of the American commissioners. But the real value of the book lies in the fact that these treaties and reports were not readily accessible. Mr. Holls has, therefore, performed a valuable service in presenting, in an interesting and readily accessible form, a careful account of an event worthy of more consideration than it has received.

W. D. E.

THE LAW AND PRACTICE IN BANKRUPTCY UNDER THE NATIONAL BANKRUPTCY ACT OF 1898, with Citations to the Decisions to Date. By Wm. Miller Collier. Third edition. Revised and enlarged. By James W. Eaton. Albany, N. Y.: Matthew Bender. 1900. pp. xlv, 866.

The two prior editions of this book (one of which is noticed in 12 HARVARD LAW REVIEW, 288), both appearing within a few months of the enactment of the present bankruptcy act, were useful chiefly as a forecast of the probable interpretation of the act by the courts, upon the analogy of cases decided under the former bankruptcy acts. Mr. Eaton is now enabled to fortify the work with the decisions of the last two years upon the present act. As was to have been expected, many of the questions have been decided as under the previous statutes, and much of the text, therefore, has needed no material revision, but only the addition of recent authorities. When, however, the decisions have gone *contra* to Mr. Collier's prognostications, or have served to throw new light on some complex matter, the text has been rewritten or expanded in conformity with the present state of the law. The arrangement of the book, treating in turn each section of the act, is, in the main, convenient though not always logical, but that defect is primarily the fault of the act itself. The commentary is suggestive and the citations full. Extracts from recent decisions are inserted with discrimination. Besides this statement of the act section by section, each with its appropriate comment and authorities, the book contains the general orders in bankruptcy, annotated, the official forms, and the United States Equity Rules (now followed in bankruptcy proceedings), each separately indexed. The text of all the four federal bankruptcy acts, state exemption laws, and list of judges and clerks of courts of bankruptcy, and the time and place of holding court, etc., together with a general index, complete the volume. The work is on the whole adequate and seems well adapted to the needs of the practising lawyer.

E. S. T.

We have also received:—

A TREATISE ON THE LAW OF WATERS, including Riparian Rights and Public and Private Rights in Waters Tidal and Inland. Third edition. By

John M. Gould. Chicago: Callaghan & Co. 1900. pp. cxvii, 956. *Review will follow.*

A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES. By John Lewis. Second edition. In two volumes. Chicago: Callaghan & Co. 1900. pp. cclix, 686; 687-1555. *Review will follow.*

BRAIN IN RELATION TO MIND. By J. Sanderson Christison, M. D. Second edition. Chicago: The Meng Publishing Co. 1900. pp. 143.

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FUTURE INTERESTS IN PERSONAL PROPERTY.

SOME time ago, a student at the Harvard Law School came to me with a question which was puzzling him. We had a long talk, in which many diversities were taken and points resolved, but the substance of the discussion can be put into the form of a short Socratic dialogue in which I do not play the part of Socrates.

S. If a silver cup is bequeathed to a man for his life, and on his death to a college, you say, do you not, that the man has the absolute property, and that the college has not an interest in the nature of a vested remainder, but has an executory interest.

G. That is what I say.

S. Suppose the testator bequeaths the cup to his son for life, and on his death to the son's oldest son for life, and then to the college, and that the testator's son is never married, is the gift to the college too remote?

G. No, it is not too remote.

S. But if it is executory, as you say it is, surely it is too remote.

G. It is, indeed, on the one hand, executory, but on the other hand it is to be considered, on a question of remoteness, as if it were a devise of land, and, if it were land, the gift to the college would be vested and therefore not too remote. You will find the authorities in § 117 of my book against Perpetuities.

S. Let me put another case : Suppose I give a cup to a man to hold during his life, and I say nothing as to what is to happen on his death, where does the cup go on his death ?

G. Surely it comes back to you, or, if you are dead, then to your executor.

S. How can that be? The man, you say, has the absolute property ; there is no gift away from him. Why does not the cup go to his executor ?

G. In Delaware, indeed, it does ; but in the rest of the common law world it comes back to you, as I have said.

S. For most purposes it is all the same whether a future interest in personalty is vested or executory, is it not ?

G. That is true.

S. I have suggested two classes of cases in which it is important whether you consider a future interest in a chattel to be vested or executory. Do you know of any other ?

G. I do not at present think of any other classes of cases.

S. Nor do I think of any other. This is, then, what you do : You say that future interests in chattels are executory, and yet in the only cases in which it is of any consequence whether they are vested or executory, you treat them as vested.

G. It would seem that that is what I do.

S. But, by the shade of that great man, Mr. Pooley, that is strange.

G. It is indeed strange.

S. Why do you act thus ?

G. It is desirable that future interests in personalty should be considered vested for several reasons. *First*—

S. Pardon me, but I do not deny that future interests in personalty should be treated as vested, — that, indeed, is excellent, — but why, if you always treat them as if they were vested, do you persist in calling them executory ?

G. Because Lord Coke, and Mr. Preston, and Mr. Joshua Williams say I must. We should revere the gods.

This conclusion was not satisfactory, I fancy, to my interlocutor ; it certainly was not to me. But the conversation set me a thinking on the true nature of future interests in personalty.

Lord Coke, in *Lampet's Case*,¹ says : " This case of a devise of

¹ 10 Co. 46 b, 47 a.

a lease for years to one for life, and after his death to another during the residue of the term, hath produced *septem quæstiones vexatas et spinosas*." The case of a like bequest of a chattel personal has added to the difficulty of these questions; they have never been satisfactorily solved, nor does such solution seem possible until a clear conception is formed of the nature of future interests in personalty. This conception has hitherto been absent in the law. The following essay is offered, with great diffidence, as an attempt to aid in supplying the want.

Property is a right *in rem* (or against all the world) which gives to the owner of the right an indefinite (though not necessarily an unrestricted) power of user over a thing, as opposed to a right *in aliena re*, such as an easement or *servitus*, which gives the person having the right a certain definite power of user over a thing in which another has the property.

FUTURE INTERESTS IN REAL ESTATE.

Property may be of either limited or unlimited duration. At least, this is the doctrine of common law with regard to land. Property in land is called an estate. It may either be a right which on the owner's death passes to successors, determined by certain rules indefinitely — that is, without defined limit — as an estate in fee-simple or in fee-tail; or it may be a right for a period which must come to an end, although the time at which it will determine is uncertain — as an estate for life; or it may be a right for a period which has a termination certain, — as an estate for years.

Estates are either present or future.

Future estates are either vested or executory.

I. A vested future estate is one which is prevented from coming into possession only by the existence of some previous estate or estates; it is an estate which is ready to come into possession in whatever way and at whatever time the preceding estate or estates determine. For instance, if land is devised to A for life, and subject to A's life estate, to B and his heirs; B has a vested estate. These estates are reversions or vested remainders.

II. An executory estate is one which will not become a present estate until something, other than the termination of a previous estate or estates, occurs.

This something may be an event certain or uncertain.

A. If it is a certain event,

(1) It may be one which will happen at a time certain.

Thus, a devise of land to A to hold from the first day of January after the testator's death creates an executory estate of this first sort.

Or (2) It may be an event which will certainly happen, but of which the time of happening is uncertain.

Thus, a devise of land to B from and after the death of A (A not taking a life interest) creates an executory estate of this second kind.

B. If it is an uncertain event.

Then the estate is a contingent one.

(1) It may be one which must come into possession, if at all, on the termination of a preceding estate or estates as originally limited. Estates of this first kind are contingent remainders.

Thus, upon a devise of land to A for life, and if A die unmarried then to B and his heirs, B has a contingent remainder.

Or (2) It may be an estate which may come into possession at a time other than the termination of the preceding estate or estates as originally limited.

Thus, upon a devise of land to A and his heirs, but if A die unmarried to B and his heirs, B has an executory interest of this second kind.

Estates of all the above kinds can be created in land at the present day, but originally this was not so.

Owing to familiar doctrines of the feudal law, into which it is unnecessary here to go, the only future estates of realty which the law originally allowed were estates which fitted on to previous estates, without cutting them short, or leaving a gap. These estates were called reversions or remainders, and they came into possession either whenever and however the previous estates determined, in which case they were reversions or vested remainders (I. *ante*), or else they came into possession immediately upon the determination of the previous estates as originally limited, if some event (other than the determination of the preceding estates) had or had not happened. In this case they were called contingent remainders. Of such cases, II. B. (1) is the type.

The other kinds of executory estates were brought in by the Statute of Uses and the Statutes of Wills, and are represented by II. A (1) and (2) and II. B (2); they had various names—springing uses, shifting uses, executory devises, conditional limitations.

It will be noticed that contingent remainders are here classed

among Executory Estates, as opposed to Vested Estates; this is a convenient classification, and there does not seem any good term other than "Executory Estates" to express the opposite of Vested Estates. But, to prevent confusion, it must be borne in mind that contingent remainders are often excluded from the definition of executory estates, and a distinction made between remainders, vested and contingent, on the one hand, and executory estates on the other, a remainder being an interest which will come into possession, if it comes at all, on the termination of some estate as originally limited. That is, Vested Estates are opposed to Executory Estates in the larger sense, which consist of Contingent Remainders and of Executory Estates in the narrower sense.

FUTURE INTERESTS IN PERSONALTY.

There is no reason in the nature of things why the law should not allow the same future interests in personality as are allowed in realty. There are no feudal doctrines to limit their creation, and they are not dependent on any statutes abrogating those doctrines.

We shall see, however, that this has not always been supposed to be the case.

Personal property is of two kinds, chattels real and chattels personal. When future interests in personal property have been in discussion, mistakes have, I think, occurred from the two kinds of chattels being confused.

CHATTELS REAL — ESTATES FOR YEARS.

Estates in land which have a termination certain, or estates for years, are not deemed in the Common Law realty, but personality; if the owner dies before the years have run out, the estate goes not to his heirs, but to his executors.¹

Such an estate is a chattel real, and there may be estates or interests in it. Let us take the interests in realty and see how far they can be applied to chattels real. These interests are of three kinds: (I.) Rights passing on death to successors; (II.) Rights which determine at a fixed time, estates for years; (III.) Rights which must determine, but whose time of termination is uncertain, estates for life.

Rights passing on death to successors. In the earliest times, estates for years might be made transmissible to heirs,² but for centuries the only successors on death that the Common Law

¹ See 2 Poll. & M. Hist. Eng. Law (2d ed.), 110-117.

² See *Ib.* 115.

has allowed in chattels real have been executors or administrators, and therefore a lease for years to A and his heirs, or to A and the heirs of his body, is regarded as an inexact but successful attempt to give an estate for years to A and his executors and administrators.¹

Taking up (II.) estates for years, we find that such estates in the form of sub-leases have been allowed from an early date² down to the present day without question; and that upon such a sub-lease the reversion remains in the owner of the chattel real and is a vested interest.

Coming now to (III.) estates for life, we find it laid down that there can be no such thing in a chattel real; that if a term for years is granted to A for life, A takes the absolute interest; and that upon A's death the term goes to A's executors and administrators, and does not revert to the grantor. Why is this? It is not because you cannot have a particular estate in a chattel real, for we have seen that you can have in a chattel real an estate for years and a vested reversion.

The reason why there could be no estate or interest for life in a chattel real was the technical one that in the eye of the law a life estate was greater than an estate for years; and therefore as a term for years, even for a thousand years, would merge in a life estate, so a grant of a term for years to one for his life purported to carry something which was greater than a term for years and which carried merely a term for years only because that was all there was to carry, and did carry the whole term.

Thus in *Welcden v. Elkington*:³—

"If one who has a term for years grants it to another during his life, it is as much as if he had granted it during all the years, for the limitation for life is as great as a limitation for all the years and comprehends in judgment of law all the years, for inasmuch as a time for life is greater than a time for years, therefore the lesser is included in the greater."

So in *Woodcock v. Woodcock*, per Walmsley, J.:⁴—

"The law will not presume that there should be a continuance of the term after the death of the daughter."

¹ Lit. § 740; Co. Lit. 388 a.

² 2 P. & M. Hist. Eng. Law, 112.

Lord Mansfield's statement in *Wright d. Plowden v. Cartwright*, 1 Burr. 282, 284, that according to the old cases "the gift of a term (like any other chattel) for an hour, was good forever," appears to be grounded on the mistake analogy of a chattel personal. On the gift of a chattel personal for an hour *vide infra*.

³ Plowd. 519, 520.

⁴ Cro. El. 795. See *Chalfont v. Okes*, 1 Ch. Cas. 239; *Jermyn v. Orchard*, Show. P. C. 199.

So, although a term for years may be assigned to have and to hold from and after a future time,¹ yet such a grant to take effect after the death of the termor was said to be bad because the law presumed that the termor would live longer than the term.

“And hereupon Popham said it had been held, that if one has a lease for years of land and grants to another all the term which should be to come at the time of his death, this grant is void, for in that he will hold the term during his own life, thereby he holds it for a time, which is as long as he has an interest in the land, so that there is no certainty that the term will ever commence, and therefore the grant so made is void. And the Lord Dyer in his argument afterwards affirmed that such grant could not be good to commence after the death of him who had the term; but he said that in a case which lately came before the justices of the King’s Bench upon a *postea*, where lessee for years granted by deed all his term to another, *habendum* to the grantee from the time of the death of the grantor, it was adjudged that the *habendum* was void and that the term passed presently, because the premises of the deed and the *habendum* could not stand together; for by the premises of the deed the term was granted presently, and then the *habendum*, which would make the term commence after death, was inconsistent with the premises, and could not make any interest to pass, because the time when it should pass was thereby made uncertain; for by the *habendum* the grantor intended to reserve to himself the estate or interest as long as he should live, and that the years which were to come after his death should pass, which could not be, because, when he reserved it for his life, therein he reserved it for all the term which he had, for a time for life is greater than a time for years; and therefore, inasmuch as the *habendum* and the premises could not stand together, the court adjudged that the term passed by the premises of the deed, rather than the *habendum* should destroy the whole. But in the other case, where lessee for years, without any *habendum*, grants to another all his term which shall be to come at the time of his death, the whole shall be totally void, because it is but one entire sentence.”²

But in *Rayman v. Gold*,³ it was said that a man could either demise or devise a term to have and to hold after the death of a stranger who took no interest in the estate.

The difference between the two cases is this: In the first case there was created, by way of reservation, an estate for life in the termor; and as, by the presumption of law, an estate for life cannot be less than an estate for years, the whole interest passed to

¹ Per Anderson, J., *arguendo*, in *Welcden v. Elkington*. Plowd. 519, 524.

² *Welcden v. Elkington*, Plowd. 519, 520. See *Anon.*, 1 And. 122.

³ *Moore*, 635.

the termor; but in the second case, although by presumption of law a life estate is greater than an estate for years, yet there is no presumption that a certain man might not die within a term, and therefore in the second case the demise or devise was good, Mr. Preston seems to have overlooked this distinction.¹

So far as transfers *inter vivos* are concerned, the law of England has remained in this condition down to the present day. The only thing to the contrary is the ambiguous remark in Butt's Case:² "So if the lessee for years grants the carve of land to another for the term of his life, he hath the whole term if he live so long, as well as in the case of a devise."³

But from an early period, upon the devise of a term to one for life, and upon his death to B, the devise to B was held good. The first suggestion that this might be done was in 1535;⁴ but the point was first distinctly held in Welcden v. Elkington.⁵ This decision was, upon the whole, followed, but there were judgments and *dicta* the other way, notably in Woodcock v. Woodcock,⁶ until in Manning's Case,⁷ and Lampet's Case,⁸ the validity of such devises over was settled.

The series of cases will be found in Gray, Rule against Perpetuities, §§ 149-152.⁹

What was the theory upon which the court went in allowing these future devises of estates for years?

It was at first suggested that there might be a difference between those cases where the term itself was given for life, and those cases where the use and occupation of the term were given, but this distinction was emphatically negated in Manning's Case.

The theory adopted seems to have been this: To carry out the intention of the testator, the apparent order of the limitations was reversed. If a term was devised to A for life, and on A's death to B, this was considered as, first, a gift of the term to B after the death of A (which, as we have seen, is good), and then a gift of what remained to A; that is, B had an executory devise and A the whole estate, subject to the executory devise.

¹ 2 Prest. Abs. 6, 144; and *cf.* Lewis, Perp. 93, 94.

² 7 Co. 23 a.

³ "When they [future limitations of terms] came to be allowed, by will, or by declaration of trust, the *substantial reason* was the same for allowing them by deed." Per Lord Mansfield, C. J., in *Wright v. Cartwright*, 1 Burr. 282; and, as in that case, the courts have been astute to construe deeds so as to avoid the application of the doctrine.

⁴ Anon., Dyer, 7 a.

⁵ Plowd. 519; Dyer, 358 b.

⁶ Cro. El. 795.

⁷ 8 Co. 94 b.

⁸ 10 Co. 46 b.

⁹ *Cf.* 2 Harg. Jurid. Arg. 41, 42.

"And inasmuch as the intent of the testator is evident by these words, it is the office of the court, as Anderson and Manwood said (and as Mounson, Justice, also afterwards said to me) so to marshal and construe the words that the intent may take place and the end be effected and not destroyed, if any sense at all can be made of them by law. Then here it appears to the court that the lease was made for sixty years from the feast of the Annunciation of our Lady *in anno* 35 H. 8, so that the lease would end in the year of our Lord 1604. And it was the will of the testator that his wife should have the land for so many of the years as she should live and no longer, and that his son should have the residue. Then, in order to set the estates devised in a clear light, and to make them stand with the law, suppose that the estate limited to the son had been first expressed, and the wife's estate last, as if he had devised that the son should have the land from the death of his wife unto the end of the term, or unto the Annunciation of our Lady in the year of our Lord 1604, and suppose further that he had devised the land to his wife during her life, would not this form of words have served the turn of both the wife and the son? And would not the law have warranted every part of this devise? Most certainly it would. And, Sir, so much is done in the present devise of the testator, for his devise is in substance to that purpose, and his words amount to as much. And it is the office of the court to adjudge what part of the sentence precedes and what follows, and they ought so to place them that the one part may not destroy the other, but that each may stand together. . . .

"Wherefore, inasmuch as the intent is the principal point to be considered in wills, and the words ought to be construed and applied so as to perform that intent, it is reasonable, and the office of the judges, to make such exposition of the words in the present case as is agreeable to the intent of the testator and consistent with the law of the realm, and that is, to construe the latter devise to the son to precede the former devise to the wife, which exposition is consonant to law and equity."¹

"So in the case at bar, when the wife dies it shall vest in Matthew Manning as by an executory devise, as if he had devised that after a son has paid such a sum to his executors, that he shall have his term, or that after the death of A that B shall have the term, or that after his son shall return from beyond the seas, or that A dies, that he shall have it, in all these cases and other like, upon the condition or contingent performed the devise is good, and in the mean time the testator may dispose of it; and therefore in judgment of law *ut res magis valeat*, the executory devise shall precede, and the disposition of the lease till the contingent happen shall be subsequent, as in the case at bar it was, and so all shall well stand together; for when he made the executory devise he had a lawful power, and might well make it, and afterwards in the same will he

¹ Welcden v. Elkington, Plowd. 522.

had lawful power and might well devise the lease till the contingent happened, and therefore it is as much as if the testator had devised that if his wife died within the term that then Matthew Manning should have the residue of the term, and farther devised it to his wife for her life."¹

As we shall see, in the United States, future limitations of chattels personal can generally be created by deed as well as by will, and it seems probable that the same extensions would be allowed with chattels real. But there is no decision precisely in point, although in Maryland it has been held in two cases that future limitations of leaseholds renewable forever are good;² and in the latter case the general question is discussed, and the conclusion reached that future limitations of ordinary terms for years can be created in this country as well by deed as by devise.

Assuming, then, that if, in England by will, and in the United States by deed or will, a chattel real is given to A for life, and on his death to B, B takes a good legal estate; what is its character? Is it in the nature of a vested remainder of realty after a life estate, or is it in the nature of an executory devise after an absolute interest? We have seen that the latter is the theory of Manning's case, and the older authorities. For most purposes this question is of no importance. B has a good legal interest, and that is enough; but there are two classes of cases where the question becomes a serious one.

First. Suppose a term is devised to A, who is now a bachelor, for life, on his death to A's eldest son for life, and on the death of such eldest son to A's other children absolutely. Here, had the subject of the devise been a fee instead of a chattel real, the gift to A's eldest son for life and the gifts in remainder to A's other children would all have vested in the lifetime of A, and so none of them would have been bad for remoteness. If, therefore, upon this devise of a term the estates for life are really life estates, then the final limitation to A's younger children is vested and good. But if what purport to be life estates in the term are really absolute interests, then the final limitation is an executory devise, which does not vest until it comes into possession, and is therefore too remote.

Second. Suppose a term is devised to A for life, and there is no devise over. If A's estate is really a life estate, then there is a reversion in the executor of the testator, and upon A's death the term passes to such executor; but if A's estate is really absolute,

¹ Manning's Case, 8 Co. 95 a. See Fearn, C. R. 402, 403; Lewis, Perp. 87.

² Arthur v. Cole, 56 Md. 100; Culbreth v. Smith, 69 Md. 450.

then, as there is no gift over, the term, upon A's death, will pass to A's executor.

The theory of the old cases, based on the doctrine that there can be no life estate in a term, would require us to hold, in the first case, that the devise to A's younger children was too remote, and, in the second case, that the term would pass to A's executor and not to the executor of the testator. I am not aware that the first of these questions has actually arisen either in this country or in England. The second question has arisen in one case, *Eyres v. Faulkland*,¹ and in this, contrary to what theory seems to demand, there was held to be a reversion to the executor of the testator. Whether it is worth while to preserve this doctrine will be considered after dealing with the law as to future limitations of chattels personal.

CHATTELS PERSONAL.

The early law of chattels personal, and particularly the question when and how far property was recognized in them apart from possession, has been discussed by Professor Maitland and Professor Ames in their invaluable articles on the seisin and disseisin of chattels.² I shall not wander into this attractive field, but start with the fifteenth century. I suppose it will be generally conceded that at that time the ideas of possession and of property were so far distinguished that the owner of goods who had bailed them to A would be considered as still having the property in them, although they were in A's possession.

There was no tenure, and there were no estates, in chattels personal; absolute property was the only kind of property recognized. In *Bro. Ab. Devise*, 13, it is said, "gift or devise of a chattel for an hour is forever."

Professor Ames has some interesting remarks on this point:—

"If a chattel, real or personal, was granted or bequeathed to one for life, the grantee or legatee became not only tenant for life, but absolute owner of it. In other words, there could be no reversion or remainder in a chattel. Possibly others may have been as much perplexed as the present writer in seeking for the reason of this rule. The explanation is, however, simple. The common-law procedure, established when such limitations of chattels were either unknown or extremely rare, gave the reversioner and remainder-man no remedy against the life tenant. There was no action for chattels corresponding to the *formedon* in reverter and remainder for land. *Detinue* would, of course, lie in general on a contract of bailment; but the contract of bailment, like a contract for

¹ 1 Salk 231.

² 1 Law Qu. Rev. 324; 3 HARV. LAW REV. 23, 313, 337.

the payment of money, must be conceivably performable by the obligor himself, and therefore before his death; he could not create a duty binding only his executor. Consequently, there being no right of action against him, the life tenant's power of enjoyment was unrestricted. His ownership was necessarily absolute."¹

There are three difficulties in accepting this explanation.

First. It does not meet the case just cited of the gift of a chattel for an hour; a contract of bailment for an hour is performable by the obligor.

Second. By the end of the fourteenth century, detinue could be maintained for a wrongful detention apart from contract.

Third. In 1459² a bailment for life was recognized as valid.

The reason why a gift of a chattel for an hour carried the absolute property was, it is submitted, that, executory interests not yet having been conceived of, property carried with it the absolute indefeasable power of alienation or destruction, and one who had this power for a moment gained the complete control. We have a perfect instance of the survival of this doctrine in the modern law on consumable articles. If a cellar of wine is bequeathed to A for life or for a year, he has the absolute interest, for there is no restraint on his power to drink or waste it.

But although property in chattels was always absolute, the use and occupation of them might be given to another than the one who had the property. Such gifts were generally for years or at will; they probably could not be given to a man and those succeeding him on his death.³

Could there be a bailment of goods giving the bailee the use and occupation of them for life? There was certainly no principle of law against a bailment for life, and in the first case that has yet been discovered on the question, the validity of such a bailment is distinctly recognized. In the Year Book of 37 Henry VI. 30 (1459), a testator made A and B his executors, and bequeathed a graile or mass-book to B to have and use for the term of his life, and after his death the remainder to A in the same manner for the term of his life, and after his death the remainder to the parishioners of a church forever. The Court of Common Pleas held that the property was "not in the devisees, for they will have only the occupation and 'manurance' for term of their two lives and so no property in them." Bro. Ab. Devise, 13, under this case says:—

¹ 3 HARV. LAW REV. 315.

² Y. B. 37 Hen. VI. 30.

³ See, however, Anon., Owen, 33.

"In the time of Henry VIII. and Edward VI., this is good law that the occupation can so remain ; but if the thing itself was devised to one the remainder is void, for a gift or devise of a chattel for an hour is forever, and the donee or devisee can give, sell, and dispose of it, and the remainder dependent on it is void, which note for it is '*valde bone diversitie.*'"¹

That is: no legal property could be created in a chattel personal other than an absolute interest, but by the bailment of such a chattel to A the use or occupation might be given to A for life, and although A thereby acquired no property, he yet gained a right of possession.

The doctrine as then held is set forth in a decision of the Court of Common Pleas:—

"A prohibition was prayed unto the Council of the Marches of Wales, and the case was thus: A man being possessed of certain goods, devised them by his will unto his wife for her life, and after her decease to J. S., and died. J. S. in the life of the wife did commence suit in the Court of Equity, there to secure his interest in remainder, and thereupon this prohibition was prayed. And the Justices, viz.: Banks, Chief Justice, Crawley, Foster (Reeve being absent), upon consideration of the point before them, did grant a prohibition, and the reason was because the devise in the remainder of goods was void, and therefore no remedy in equity, for *Æquitas sequitur legem*. And the Chief Justice took the difference as in 37 H. 6. 30, Br. Devise, 13, and Com. Welkden & Elkington's Case, betwixt the devise of the use and occupation of goods, and the devise of goods themselves. For where the goods themselves are devised, there can be no remainder over; otherwise, where the use or occupation only is devised. It is true that heirlooms shall descend, but that is by custom and continuance of them, and also it is true that the devise of the use and occupation of land is a devise of the land itself but not so in case of goods, for one may have the occupation of the goods and another the interest, and so it is where a man pawns goods and the like. For which cause the Court all agreed that a prohibition should be awarded."²

But by a series of decisions in the seventeenth century the severity of this distinction was relaxed, and it was held that if a chattel personal be bequeathed to A for life and on A's death to B, the bequest to A will be construed as a bequest of only the use and occupation to him, that he will have the possession, but that the property will still be in B.³

¹ See Welkden v. Elkington, Dyer, 358 b, 359 a; Plowd. 519, 521, 522; Paramour v. Yardley, Plowd. 539, 542.

² Anon., March 106 (1641).

³ Vachel v. Vachel, 1 Ch. Cas. 129 (1669); Catchmay v. Nicholas, Cas. temp.

And it is now settled in England that if a chattel personal is bequeathed to A for life, and on his death to B, B has a legal property interest.

It seems to be the common notion in England that a legal interest in chattels personal after a gift of them to another for his life can be created only by will, and not by a deed or other instrument operating *inter vivos*, and consequently, when it is desirable to make such limitations, the legal title is vested in trustees.¹

A court may lend itself to construe a gift of a chattel for life as a gift of the use of the chattel for life, with greater ease in a will than in a deed, although this seems undesirable; but where the gift by deed is of the use and occupation of a chattel to A for his life and on his death the chattel to belong to B, there appears to be no reason why the gift should not take effect according to its terms. Undoubtedly, as has been said, the idea seems to prevail among the profession in England that the gift by deed to B would be void, but there is, it is believed, no decision or authoritative *dictum* to that effect, and Blackstone's authority is flat to the contrary. He says,² "If a man either by deed or will limits his books or furniture to A for life, with remainder over to B, this remainder is good."

And, as we shall see, Blackstone's opinion, which I submit is sound on principle, has been all but universally adopted in America.

The theory that if a chattel personal is bequeathed to A for life and on his death to B, A has the use and occupation, and B the immediate property, subject only to such use and occupation in A, seems to be the doctrine of the cases cited. This is clearly the doctrine in the case of the Grail and both the cases from Plowden, as the passages cited above show. So in *Vachel v. Vachel*,³ where certain "rarities" were given to Rebecca Vachel for life and on her death to remain to the use of Thomas Vachel, Lord Keeper Bridgman held that Rebecca "ought only to have the use of the said rarities during her life only, and [Thomas] is to have the same after her death."

In *Hyde v. Parrat*,⁴ Lord Keeper Somers, "on the strength and

Finch, 116 (1673); *Smith v. Clever*, 2 Vern. 38, 59 (1688); *Shirley v. Ferrers*, 1 P. Wms. 6, note (1690); *Clarges v. Albemarle*, 2 Vern. 245 (1691); *Anon.*, Freem. Ch. 206 (1695); *Hyde v. Parrat*, 1 P. Wms. 1; 2 Vern. 331 (1691); *Tissen v. Tissen*, 1 P. Wms. 500 (1718). See *Randall v. Russell*, 3 Mer. 190, 195; *Hoare v. Parker*, 2 T. R. 376; *Gray*, Perp. § 84.

¹ Williams, *Personal Property* (15th ed.), 306 *et seq.*

² 2 Bl. Com. 398.

³ 1 Ch. Cas. 129.

⁴ 1 P. Wms. 1, 6.

authority of the late precedents, which had followed the civil and canon laws, in construing the *use* of the thing, and not the thing itself to pass, where the first devise is for a limited time, in order the better to comply with the intention of the testator, allowed the devise over to be good."

So in *Tissen v. Tissen*.¹ "Anciently the notions were that a personal thing given to one for life, or even for a day, was a gift forever, and would not bear a limitation over; but the construction has since been that such devise passes only the use and profits and not the thing itself, and so it is made good that way." And in *Randall v. Russell*,² "A gift for life of a chattel is now construed to be a gift of the usufruct only."

But although there seems to have been no judicial authority for holding that one to whom the use and occupation of a chattel personal has been bequeathed has the absolute property at Common Law, yet undoubtedly, of late years, English text writers have said that upon the bequest of a chattel personal to A for life and on his death to B, A takes the absolute property, and B has not a vested interest but an executory bequest.³ This has been the common view. I adopted it in my book on the Rule against Perpetuities.⁴

There can be no doubt, I think, that *this notion arose from overlooking the distinction between chattels real and personal. There is a legal presumption that a life estate is larger than any term for years, but there is no legal presumption that an interest for life in a picture will last longer than the picture itself.* And, further, there can be no bailment of land, while there can be bailment of a chattel.

I have succeeded in finding but one case in which this comparatively modern doctrine has received judicial recognition in England. *Re Tritton, ex parte Singleton*,⁵ was a case in bankruptcy before Wells, J. A testator gave to his wife "the right of possession and enjoyment of all my pictures during her life (if she shall so desire), and subject as aforesaid I give and bequeath all my said pictures to and for my son H. J. Tritton, for his own absolute use and benefit." The widow was still alive, the son assigned his interest under his father's will, and subsequently became bankrupt. The trustee in bankruptcy contended that the assignment was a bill of sale, and void as not having been registered.

¹ 1 P. Wms. 500.

² 3 Mer. 190, 195.

³ F. C. R. 402, Butler's note; Lewis, Perp. 97; Wms. Pers. Prop. (15th ed.) 295.

⁴ § 90.

⁵ Reported 61 L. T. 130, and more fully in 6 Morell, 250.

The judge held that the son's interest was a *chose in action* which was excepted from the Bills of Sale Acts. He said :—

“ It is clear upon the authorities that there cannot be life estates and remainders of personal chattels. The interest which Mrs. Tritton took was definite, and it came first, and entitled her to the enjoyment and possession of these things—that was, to the property in them during her lifetime. The son's interest was an executory bequest, which created no present or vested interest, and which, if the mother survived him, would never come into operation.”

None of the authorities which appear in either of the reports to have been cited by the counsel bear upon the matter, except the passage in 1 Jarm. Wills (4th ed.), 879.

Having stated the old and modern theory with regard to chattels personal, let us now consider the nature of present and future interests in such chattels in the light of those theories. And, as we did with chattels real, let us take up those cases, *first*, where the first gift is to A and his executors ; *secondly*, where the first gift is to A for years ; *thirdly*, where the first gift is to A for life.

I. A chattel personal is bequeathed to A and his executors. A has undoubtedly here not only the possession but the property. As words of limitation are unnecessary to give an absolute interest in personalty, a gift to A is equivalent to a gift to A and his executors, unless the context shows that it is intended to give a less interest.

If, then, after a bequest to A and his executors there is a future gift over to B, such gift must be an executory bequest, and cannot be considered a vested interest until there is a right to immediate possession.

The consideration of the two theories we have been discussing does not affect this class of cases.

If there is no present bequest, but only a future bequest, then if no present gift is raised by implication, the property vests immediately in the next of kin or residuary legatees, and the future bequest is an executory bequest.

II. A gift to A for years. Here is a bailment to A. A has the possession, the use and occupation, but not the property. If there is a gift to B subject to this bailment, B has the property and has a vested interest. If there is no such gift to B, then the property remains in the donor or his next of kin or residuary legatees, and he or they have a vested interest. In this class of cases, also, the adoption of the one or the other of the theories is imma-

terial. I am unaware that any one at the present day would say (unless in the case of consumable chattels) that A in a case of this kind had the property and B an executory interest.

III. A bequest of a chattel personal to A for life, and on his death to B. It is in this class of cases that the adoption of the one or of the other theory becomes significant. According to the old theory, A has the possession, the use and occupation only, and B has the property and an immediate vested interest. According to the modern English doctrine, A has the absolute legal property in the chattel, with an executory bequest over to B, which becomes a vested interest only upon the death of A.¹

Whether B's interest be an executory bequest, or whether it be a vested interest, which may properly be called a *quasi* vested remainder, it is a legal interest, and beyond the control of A, so that it is for most questions immaterial which theory is adopted, and this explains why the law has remained so long in an undecided condition.

But, as in the case of chattels real, there are two questions in which the character of the future interest in chattels personal determines the decision :—

First. Suppose a chattel personal is bequeathed to A for life, and on his death to A's eldest son for life, and on the death of such eldest son to A's other children and their respective executors as tenants in common. A is at present a bachelor.

Here, on the old theory, A and his eldest son have the possession, use, and occupation one after the other, and the other children, as fast as they are born, acquire vested interests in the property. The bequest to A's younger children is good, for they must all be born and their interests vest in A's lifetime, and consequently the gift to them will not be too remote.

But, on the modern English theory, A and A's eldest son will each hold the property in succession, and the younger children will have an executory bequest which will not vest until they have

¹ Suppose the use and occupation of a chattel personal is bequeathed to A for his life, and on his death, if he leaves children, the chattel to go to them, but if he leaves no children, to go to B. In this case, the interest of the children and of B are both contingent, none of them have a vested interest. On the old theory, during the lifetime of A has any one the property of the chattel? In the case of such a limitation of realty, it has been held by many learned writers that the fee is in the testator's heirs. If this be the correct view, as it probably is (see Gray, *Perp.* § 11), it rests upon the idea that the fee must be somewhere; but there seems no technical necessity that every chattel personal should always have an owner, and therefore it is best and most natural to say that during the life of A no one has property in the chattel.

an immediate right to possession; this will not be till the death of A's eldest son, which may be more than twenty-one years after the death of A, whose was the only life in being at the testator's death. Consequently the bequest to A's younger children is void as violating the Rule against Perpetuities. Mr. Marsden, in his Treatise on the Rule against Perpetuities,¹ adopts this view.

So far as authority goes, the English decisions are all in favor of the former view.² In each of them the ultimate interest in personality after the death of an unborn person was considered vested and not too remote. In *Evans v. Walker* the interest was legal; in the other two it was equitable. But, in considering whether a limitation is vested or not, the same rules apply in equity as at law.

Second. Suppose chattels personal are bequeathed to A for life, and there is no gift over.

Here, according to the old theory, there is a reversionary vested interest in the next of kin or residuary legatee of the testator, or rather in the executor of the testator, and a right to immediate possession arises on the death of A.

According to the modern English theory, A has the absolute property, and there being no executory bequest, there is nothing to take the property from him, and on his death the chattels go to the executor of A, and not to the executor of the testator.

The only English case which touches this question is *Eyres v. Faulkland*,³ in which the point was decided, as to a term of years, in favor of the testator's executor, *vide supra*.

Hitherto I have confined myself to the English law as to chattels personal; let us now take up the law in the United States.

I. We have seen that although the English law recognizes the validity of a future bequest by will of a chattel personal, the modern English conveyancers have said that a future limitation of a chattel personal cannot be created by deed.

The decisions in North Carolina have adopted this latter view, and do not allow any future limitations of chattels personal to be created by a conveyance *inter vivos*.⁴

¹ Pp. 43, 44.

² *Routledge v. Dorrill*, 2 Ves. Jr. 357, 366, 367; *Evans v. Walker*, 3 Ch. D. 211; *Re Roberts*, 19 Ch. D. 520.

³ 1 Salk. 231.

⁴ *Cutlar v. Spiller*, 2 Hayw. 130; *Gilbert v. Murdock*, Ib. 182; *Dowd v. Montgomery*, 2 Car. Law Rep. 100; *Graham v. Graham*, 2 Hawks, 322; *Foscue v. Foscue*, 3 Hawks, 538; *Sutton v. Hollowell*, 2 Dev. 185; *Smith v. Tucker*, Ib. 541; *Morrow v. Williams*, 3 Dev. 263; *Hunt v. Davis*, 3 Dev. & B. 42; *Foscue v. Foscue*, 2 Ired.

In 1823 a statute was passed, changing the law as to slaves; but as to all other chattels the law remained, and remains the same as before.¹

But in the other states, so far as the question has yet arisen, the same future limitations of chattels personal that can be created by will can be created also *inter vivos*.²

It may therefore be said to be the general American law that any future limitation of chattels personal which can be made by will can be made also by deed.

It is submitted that the American law is a return to the sounder doctrine which was laid down by Blackstone.³ Future interests in personality owe nothing to statutes; they are what they are by the Common Law, and any distinction between the right to create them by deed and the right to create them by will seems purely arbitrary. Undoubtedly certain interests can be created under wills by language which would not have the same effect if used in deeds; but the present is not a question of construction or of the use of words, but whether it is possible, by any words, to make a future limitation of a personal chattel, and there is no reason why this power, if granted to a man on his death, should be denied to him in his lifetime.

II. A notion which has found expression in a few American cases, viz., that after a gift or bequest of the absolute property

Eq. 321. The case of *Duncan v. Self*, 1 Murph. 466, *contra*, is overruled; and *Timms v. Potter*, 1 Hayw. 234, apparently *contra*, is explained in *Gilbert v. Murdock*, *ubi sup.* See *Vass v. Hicks*, 3 Murph. 493; *Hughes v. Cannon*, 2 Humph. 589.

¹ *Lance v. Lance*, 5 Jones, 413; *Dail v. Jones*, 85 N. Car. 221.

² *Security Co. v. Hardenburgh*, 53 Conn. 169; *Tucker v. Stevens*, 4 Des. 532; *Hill v. Hill*, Dudl. Eq. 71; *McCall v. Lewis*, 1 Strob. 442; *Dukes v. Dyches*, 2 Strob. Eq. 353, note; *Dawson v. Dawson*, Rice, Eq. 243, 261; *Jaggers v. Estes*, 2 Strob. Eq. 343, 378, 397; *Nix v. Ray*, 5 Rich. 423 (*Cooper v. Cooper*, Brevard MSS. Rep.; 1 Rice, South Car. Dig. 207; *Vernon v. Inabnit*, 2 Brev. 411, and the *dictum* in *Ingram v. Porter*, 4 McCord, 198, *contra*, are overruled); *Robinson v. Schly*, 6 Ga. 515; *McGlawn v. McGlawn*, 17 Ga. 234; *Sharman v. Jackson*, 30 Ga. 224; *Price v. Price*, 5 Ala. 578; *Adams v. Broughton*, 13 Ala. 731; *Williamson v. Mason*, 23 Ala. 488; *Horn v. Gartman*, 1 Fla. 73; *Keen v. Macey*, 3 Bibb, 39; *Banks v. Marksberry*, 3 Lit. 275; *Caines v. Marley*, 2 Yerg. 582; *Johnson v. Mitchell*, 1 Humph. 168, 173; *Gullett v. Lamberton*, 6 Ark. 109.

See *Sampson v. Randall*, 72 Me. 109, 112; *Fuller v. Fuller*, 84 Me. 475, 481; *Hope v. Hutchins*, 9 G. & J. 77; *Culbreth v. Smith*, 69 Md. 450; *Bradley v. Mosby*, 3 Call, 50; *Powell v. Brown*, 1 Bail. 100; *Welch v. Kinard*, Speers Eq. 256, 262; *Henderson v. Kinard*, 29 So. Car. 15; *Kirkpatrick v. Davidson*, 2 Ga. 297, 301; *Owen v. Cooper*, 46 Ind. 524; *McCall v. Lee*, 120 Ill. 261; *Harris v. McLaran*, 30 Miss. 533, 568, 569; *Aikin v. Smith*, 1 Sneed, 304; *Lyde v. Taylor*, 17 Ala. 270; *Jones v. Hoskins*, 18 Ala. 489.

³ 2 Bl. Com. 398.

in a chattel personal, there can be no executory limitation over, is of course totally erroneous.

It had its origin in *Paterson v. Ellis*,¹ where a gift over of personalty was held to be upon an indefinite failure of issue, and therefore too remote. Several members of the court, however, said that after a bequest of personalty, absolute in its terms, there could be no executory bequest. But such an idea has been entirely repudiated in New York, the courts pointing out that it arose from confounding the case of an executory bequest upon death without issue, or some other contingency not dependent upon the mere will of the first taker, which executory bequest is unquestionably good, with the case of an executory bequest over upon the failure of the first taker to dispose of his interest by deed, or by deed or will, which latter form of executory bequest had been held in New York to be bad.²

The Supreme Court of Arkansas has followed the erroneous *dicta* in *Paterson v. Ellis*.³

In the case of *Wilson v. Cockrill*,⁴ it was decided that if an absolute gift of a chattel personal was made by deed, an executory limitation over was void. The court declined to consider whether it would have been good if created by will. This is believed to be the only American case, outside of North Carolina, in which any distinction between the validity of an executory limitation made by deed and of one made by will is suggested. Perhaps also *Betty v. Moore*,⁵ should be added.

The cases in the United States in which executory limitations after absolute gifts or bequests of chattels personal have been allowed are very numerous.⁶

¹ 11 Wend. 259.

² *Norris v. Beyea*, 13 N. Y. 273; *Tyson v. Blake*, 22 N. Y. 528. See Gray, *Restraints on Alienation*, §§ 65 *et seqq.*

³ *Moody v. Walker*, 3 Ark. 147; *Maulding v. Scott*, 13 Ark. 88; *Scully v. Vaugine*, 15 Ark. 695; *Slaughter v. Slaughter*, 23 Ark. 356; *Robinson v. Bishop*, 23 Ark. 378. But *cf.* *Bunch v. Nicks*, 50 Ark. 367, 376.

⁴ 8 Mo. 1.

⁵ 1 Dana, 235.

⁶ *Drury v. Grace*, 2 H. & J. 356; *Moffat v. Strong*, 10 Johns. 12, 18; *Deihl v. King*, 6 S. & R. 29; *Raborg v. Hammond*, 2 H. & G. 42; *Dashiel v. Dashiel*, 2 H. & G. 127; *Biscoe v. Biscoe*, 6 G. & J. 232; *Jones v. Sothoron*, 10 G. & J. 187; *Clagett v. Worthington*, 3 Gill, 83, 92; *Edelen v. Middleton*, 9 Gill, 161; *Woodland v. Wallis*, 6 Md. 151; *Budd v. Posey*, 22 Md. 48; *Waddy v. Sturman*, Jeff. 5; *Higgenbotham v. Rucker*, 2 Call. 313; *Royall v. Eppes*, 2 Munf. 479; *Timberlake v. Graves*, 6 Munf. 174; *Threadgill v. Ingram*, 1 Ired. 577; *Braswell v. Morehead*, Busb. Eq. 26; *Keating v. Reynolds*, 1 Bay, 80; *Henry v. Means*, 2 Hill (S. C.), 328; *Hill v. Hill*, 2 Dudl. Eq. 71, 83, 84; *Rogers v. Randall*, 2 Speers, 38; *Marshall v. Rives*, 8 Rich. 85;

III. To come now to the case where a chattel personal is given to A for life and on his death to B. The gift over to B is universally recognized as valid throughout the United States when it is created by will, and also (except in North Carolina) when it is created *inter vivos*. And not only is it a valid interest, but it is a valid *legal* interest which has been repeatedly the subject of an action at law.¹

But is this limitation to B a vested interest in the nature of a remainder, subject to the right of A to the possession of the chattel for life; or is A to be regarded as having the absolute property, with an executory bequest over to B? In other words, do the American courts apply the old doctrine which prevailed in England down to the middle of the last century, or have they adopted the theory of the more modern conveyancers? It is impossible to determine this from the names attributed in the reports to the interest of B, for there is no uniform practice; sometimes it is called a remainder, sometimes an executory limitation: to determine its nature, we must have recourse to the two test cases which we have applied in the case of the English Law.

First. Suppose a chattel personal is bequeathed to A for life, on A's death to his eldest son for life, and on the death of such eldest son then to the other children of A. A is a bachelor at the testator's death. Is the bequest to the younger children of A a good vested *quasi* remainder, or is it an executory bequest void for remoteness?

We have seen that all the English authority is in favor of the former view, so is the only American case I have found on the point.²

Second. Suppose a chattel personal is bequeathed to A for life, and there is no gift over, does the chattel after A's death go to the executor of the testator or to the executor of A?

We have seen that there seems to be but one English authority bearing on this question, but there is no lack of American authority.

In Delaware, if a chattel is bequeathed to A for life, A takes the absolute property.³

Henderson v. Kinard, 29 So. Car. 15; Robert v. West, 15 Ga. 122; Harris v. Smith, 16 Ga. 545; Moore v. Howe, 4 T. B. Monr. 199.

¹ This recognition of the validity of such a gift when created by deed was recognized in Virginia in an early series of cases beginning in 1736. Edmonds v. Hughes, Jeff. 2; Waddy v. Sturman, Ib. 5; Jones v. Langhom, Ib. 37; Spicer v. Pope, Ib. 43.

² Loring v. Blake, 98 Mass. 253.

³ State v. Savin, 4 Harring. 56, note; Dericksen v. Garden, 5 Del. Ch. 323.

In Merkel's Appeal,¹ a testator gave to his wife personal property "to her full ownership, so long as she doth live." The Supreme Court of Pennsylvania said: "It is a gift for life, without any limitation over, and without the intervention of a trustee. There is a line of decisions in this state which hold that such a bequest is absolute." The court cites several cases as supporting this proposition, but the only one which tends to do so is Brownfield's Estate.² The proposition is, however, repeated in Drennan's Appeal.³ It seems rather to be a rule of construction than to be based upon any peculiar doctrine as to the nature of a life interest in personality. It is justly criticised by Penrose, J., in Kane's Estate.⁴

But the great weight of authority is in favor of a reversionary interest.⁵

SUMMARY.

I. *Chattels real.*

A. There can be an estate for years (sub-lease) in a chattel real.

B. There can be no estate for life in a chattel real, because a life estate is larger than any term.

C. A gift for life of a chattel real passes the absolute interest.

D. Therefore, after a gift for life of a chattel real, there can be no vested interest or *quasi* remainder; any future interest after such gift can be good only as an executory limitation.

E. Such an executory limitation can be created by will.

F. In America (except in North Carolina) it can probably be created *inter vivos*. But there is no decision exactly in point.

G. In England it is said that it cannot be created *inter vivos*, but there is no decision to that effect.

H. The American doctrine is the better, as there is no rational distinction in this respect between deeds and wills, and no judicial authority in favor of such a distinction.

¹ 109 Pa. St. 235.

² 8 Watts, 465.

³ 20 W. N. C. (Pa.) 522.

⁴ 6 Pa. Dist. C. 553; 19 Pa. C. C. 589. See *London v. Turner*, 11 Leigh, 403, 412, 413.

⁵ *Brown v. Kelsey*, 2 Cush. 243, 248, 249; *Hoes v. Hoesen*, 1 Comst. 120; *Bartlett v. Patton*, 33 W. Va. 71; *Anon.*, 2 Hayw. 161; *James v. Masters*, 3 Murphy, 110; *Black v. Ray*, 1 Dev. & B. 334; *Creswell v. Emberson*, 6 Ired. Eq. 151 (see *Newell v. Taylor*, 3 Jones Eq. 374); *Geiger v. Brown*, 4 McCord, 418, 427, S. C., 2 Strob. Eq. 359, note; *Haralson v. Redd*, 15 Ga. 148; *Booth v. Terrell*, 16 Ga. 20; *McCutchin v. Price*, 3 Hayw. 211; *Vannerson v. Culbertson*, 10 Sm. & M. 150; *Harris v. McLaran*, 30 Miss. 533; *Keyes on Chattels*, §§ 276, 277.

I. If a chattel real is bequeathed to A, a living person, and his executors, after a bequest for life to an unborn person, such gift to A, being an executory limitation, should on theory be held void for remoteness; but there is no authority on this point.

J. If a chattel real is bequeathed to A for life, with no limitation over, A takes the whole term, and there being no limitation over, it should on theory go, on A's death, to his executor; but the only authority is *contra*.

II. *Chattels personal.*

A. A chattel personal can be bailed for years.

B. The use and occupation of a chattel can be given to A for life, the property remaining in the donor, and a gift of a chattel personal for life is construed to be a gift of the use and occupation.

C. If a chattel personal is given to A for life, and on his death to B, B takes a legal interest.

D. This can be done by will.

E. And also, in the United States (except in North Carolina), *inter vivos*.

F. In England the modern text writers say this cannot be done *inter vivos*, but there is no judicial authority to that effect.

G. The American doctrine is the better, for there is no rational distinction in this respect between deeds and wills.

H. If a chattel personal is bequeathed to A for life, and on his death to B, A has the use and occupation, and B a vested interest, a *quasi* remainder. This is the doctrine of the older cases.

I. Modern English text writers say that A has the property in the chattel, and the bequest to B is an executory limitation.

J. The older doctrine is the sounder. There is no reason why the use and occupation of a chattel personal should not be given for life; the doctrine I. (B), *supra*, as to chattels real, has no application to chattels personal; there is no legal presumption that a man will live longer than a picture or table will last.

K. Suppose a chattel personal is bequeathed to an unborn person for life, and on his death to A and his executors. If the gift to A is vested (according to the old theory), then it is not too remote; if the gift to A is executory, then it is void for remoteness. All the authorities, American and English, hold that the gift to A is not too remote.

L. Suppose a chattel personal is given to A for life, with no limitation over. Then, on the old theory, upon A's death there is a reversion to the donor or his executors. On the modern Eng-

lish theory A takes the whole property in the chattel, and there being no limitation over, it should go on A's death to his executors. There is no English authority directly on the point. The weight of American authority is in favor of the reversion.

As, therefore, there is (1) no reason why the use and occupation of a chattel personal should not be given for life;¹ (2) as the judicial authorities proceed on the theory that the gift for life of a chattel personal is a gift of the use and possession only; (3) as there is no judicial decision the other way,² but only the *cantilena* of modern text writers, based on the mistaken analogy of chattels real; (4) as on one of the test questions all the authority, English and American, and on the other the great weight of authority is in favor of the old view; and (5) as it is very desirable that on such matters there should be no difference between real and personal property, the statement may perhaps be ventured that in the United States we have stayed faithful to the old law, and that after a gift of a chattel personal for life there may be a vested interest in remainder or reversion, and not merely an executory limitation.

As to chattels real, it would certainly be desirable that in them, also, the law should recognize the possibility of interests for life, and there is no reason in the nature of chattels real why it should not. On one of the two test questions there appears to be no authority either way, and on the other the sole decision is in favor of such recognition. The only obstacle is the notion that as an estate for life is longer than any term for years, a grant for life of a chattel real must pass all that there is to pass, *i. e.*, the whole term.

Would it be too bold a step on the part of the courts to drop this bit of antiquated scholasticism and put chattels real in the same position as chattels personal?

John Chipman Gray.

NOTE. — A main motive in writing this article has been the hope that it may lead to a fuller examination of the authorities than has yet been had. The cases on future interest in personalty are so badly digested that one comes upon many of them only by accident. My learned friend, Professor Nathan Abbott, of the Law School in Stanford University, has given much attention to the subject, and I am indebted to him for kindly communicating to me the result of his exhaustive researches in the reports of several of the states. It is much to be desired that Professor Abbott should complete, classify, and publish his collections.

¹ I have in general tried to avoid the expression "bailment for life," fearing it might shock some ears, although I myself have no objection to it.

² *Re Tritton*, 61 L. T. 301, is possibly an exception.

REPUDIATION OF CONTRACTS.

II.

ON repudiation of a contract the aggrieved party must have a remedy on the contract. The only question can be what he must do in order to perfect his right of action.

If he has already performed all that the contract required of him, there can be no doubt that he may sue at once on the contract if the time when the defendant's performance was due has arrived. Whether suit may be brought at once even though that time has not arrived will be discussed later.

The situation is in legal effect similar when the injured party has not fully performed, but is literally prevented by the other party from continuing performance. Where work requires some coöperation of both parties this frequently happens. Though the plaintiff's damages may not be the same as if he had fully performed, his right of action is as complete, for when the defendant has himself caused the plaintiff's non-performance he cannot take advantage of it as a defence.

But if the injured party has not fully performed and is not prevented from continuing, yet because of the repudiation by the other party has just reason to believe that the latter will not fulfil his contractual obligation, the situation presents greater difficulty. In *Frost v. Knight*,¹ Cockburn, C. J., thus stated the law: "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

"On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of

¹ L. R. 7 Ex. 111.

it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."¹

This language was quoted with approval by Cotton, L. J., in *Johnstone v. Milling*,² and may be regarded as expressing the present understanding of English lawyers on the matter in question.³ The alternative stated as permissible in the first paragraph of Lord Cockburn's statement is not allowed generally in this country. There is a line of cases running back to 1845⁴ which hold that after an absolute repudiation or refusal to perform by one party to a contract, the other party cannot continue to perform and recover damages based on full performance. This rule is only a particular application of the general rule of damages that a plaintiff cannot hold a defendant liable for damages which need not have been incurred; or, as it is often stated, the plaintiff must, so far as he can without loss to himself, mitigate the damages caused by the defendant's wrongful act. The application of this rule to the matter in question is obvious. If a man engages to have work done, and afterwards repudiates his contract before the work has been begun or when it has been only partially done, it is inflicting damage on the defendant without benefit to the plaintiff to allow the latter to insist on proceeding with the contract. The work may be useless to the defendant, and yet he would be forced to pay the full contract price. On the other hand, the plaintiff is

¹ L. R. 7 Ex. 111, 112.

² 16 Q. B. D. 460.

³ See e. g. Leake, *Contracts* (3d ed.), 752; Mayne, *Damages* (6th ed.), 179. It is also quoted and acted on in *Dalrymple v. Scott*, 19 Ont. App. 477.

⁴ *Clark v. Marsiglia*, 1 Denio, 317, is the earliest decision. In this case the plaintiff was employed to clean and repair a number of pictures, for which the defendant agreed to pay. After the plaintiff had begun work upon them the defendant countermanded the order. The plaintiff nevertheless completed the work and sued for the full price. The court held he could recover only for what he had done before the order was countermanded, with such further sum as would compensate him for the interruption of the contract at that point.

Later decisions involving the same principle are *Moline Scale Co. v. Beed*, 52 Ia. 307 (conf. *McAlister v. Safley*, 65 Ia. 719); *Black v. Woodrow*, 39 Md. 194, 216; *Heaver v. Lanahan*, 74 Md. 493; *Collins v. Delaporte*, 115 Mass. 159 (semble); *Gibbons v. Bente*, 51 Minn. 499; *Dillon v. Anderson*, 43 N. Y. 231; *Lord v. Thomas*, 64 N. Y. 107 (semble); *Johnson v. Meeker*, 96 N. Y. 93; *People v. Aldridge*, 83 Hun, 279 (semble); *Heiser v. Mears*, 120 N. C. 443; *Davis v. Bronson*, 2 N. Dak. 300; *Chicago, etc. Co. v. Barry*, (Tenn.) 52 S. W. Rep. 451; *Tufts v. Lawrence*, 77 Tex. 526; *Derby v. Johnson*, 21 Vt. 17; *Danforth v. Walker*, 37 Vt. 239; 40 Vt. 257; *Cameron v. White*, 74 Wis. 425; *Tufts v. Weinfeld*, 88 Wis. 647.

interested only in the profit he will make out of the contract. If he receives this it is equally advantageous for him to use his time otherwise.

By every consideration of mercantile convenience these decisions are correct. The facts of the only case¹ which is directly opposed to them need only be stated to illustrate this. The defendant, resident in Illinois, contracted to buy of the plaintiff, resident in New Jersey, 500 tons of barbed wire. After 120 tons had been delivered the defendant requested the plaintiff to stop further shipments, and on the refusal of the latter, telegraphed, "Will not take wire if shipped." Nevertheless, the plaintiff went through the futile and expensive steps of preparing and sending the rest of the wire, and was held entitled to recover damages for so doing.

The English courts have recognized the duty of a plaintiff to mitigate or at least not to enhance the damages which a defendant is to be called upon to pay;² and it is quite possible that Lord Cockburn, in stating as he did the first alternative right of a party aggrieved by repudiation of a contract, did not appreciate that his statement justified a violation of that duty.³ It need not be contended that in every case the principle of damages in question will deprive the plaintiff of the right to continue performance of the contract after it has been repudiated. There may be cases where so doing will not needlessly enhance damages. But it is clear that such cases must be exceptional.

Lord Cockburn's statement of the plaintiff's second alternative is that "The promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it." The two clauses of this sentence logically contradict each other. If the contract is put an end to, no action can be brought upon it. If an action may be brought upon it, either at once or at any time in the future, it is not put an end to. The question of the time when the action should be brought is not immediately essential

¹ *Roebbling's Sons' Co. v. Lock Stitch Fence Co.*, 130 Ill. 660. See, also, *Lake Shore, etc. Ry. Co.*, 152 Ill. 59.

² *Mayne*, *Damages* (6th ed.), 180; *Harries v. Edmonds*, 1 C. & K. 686, 687; *Roper v. Johnson*, L. R. 8 C. P. 167; *Roth v. Taysen*, (C. A.) 12 T. L. R. 211; *Brace v. Calder*, (C. A.) [1895] 2 Q. B. 253; *conf.* *Brown v. Muller*, L. R. 7 Ex. 319; *Re South African Trust Co.* (C. A.) 74 L. T. 769.

³ Lord Cockburn's statement is also sometimes repeated by American courts, which would not be likely to enforce it to its logical conclusion. See *Foss, etc. Co. v. Bullock*, 59 Fed. Rep. 83, 87; *Strauss v. Meertief*, 64 Ala. 299, 307; *Claes, etc. Mfg. Co. v. McCord*, 65 Mo. App. 507; *Walsh v. Myers*, 92 Wis. 397.

here, and that question being left for subsequent discussion, it may be laid down as a more logically coherent and more practically useful statement that the promisee may, if he thinks proper, treat the repudiation of the other party as a ground for putting an end to the contract, as shown in the earlier part of this article. If this course is adopted no rights under the contract can remain, though a quasi-contractual right to recover the value of anything which has been done will survive. Or the promisee may decline to continue to perform and sue the promisor for his breach of contract. Ordinarily, of course, a plaintiff in an action upon a contract cannot succeed if he has himself failed to perform at the proper time; but if that failure to perform was excused by the defendant's own conduct this principle does not apply. The authorities furnish abundant illustration of this when the excuse for the plaintiff's failure to perform consisted in a prior serious breach of the contract by the defendant.¹ The same principle covers the case of repudiation without an actual breach of contract. The reason why the plaintiff must ordinarily have performed in order that he may recover is the same reason which underlies the doctrine of failure of consideration. The mutual performances in a bilateral contract are, barring exceptional cases, intended to be given in exchange for each other, and if the exchange fails on one side owing to defective performance, the other party may likewise decline to perform. This reason was pretty well hidden during the early development of the doctrine under the terminology of implied conditions, but it is sufficiently apparent at the present day. Now, if it be an excuse which will justify a promisor in breaking his promise that his co-contractor has failed to give the performance agreed upon as an exchange, it should likewise be an excuse that the co-contractor has made it plain, as by repudiation, that he will not give such performance when it becomes due in the future. A promisor can no more be expected to perform his promise when he is not going to receive counter-performance than when he actually has not received it. Baron Parke—a judge not likely to stretch too far the rules of the common law in order to work out justice—so held in *Ripley v. M'Clure*.²

Neither where the plaintiff's excuse for his own non-performance is the defendant's actual breach of the contract nor where that excuse is a prospective breach because of repudiation does the plaintiff terminate the contract merely by availing himself of his excuse.

¹ See Parsons on Contracts (8th ed.), ii. 790.

² 4 Ex. 345.

The contract still exists, but one party to it has a defence and an excuse for non-performance. It may be thought that this statement differs from that of Lord Cockburn's second alternative only in words. Even so, words have their importance. If wrongly used, wrong ideas are sure to follow, and wrong decisions follow wrong ideas. It is a source of serious confusion in the cases that a contract is frequently spoken of as "rescinded" or "put an end to," when in truth one party to the contract has merely exercised his right to refuse to perform because of the wrongful conduct of the other party.¹ To be sure it frequently makes little practical difference whether this is the case or whether the contract is in fact rescinded. Where the only question that arises is in regard to the liability of a defendant for his refusal to perform the result is the same whether the whole contract is rescinded or whether it still subsists subject to a defence on the part of the defendant. But if the defendant seeks by counter-claim or cross-action to establish a right on his part to damages, his success depends on the existence of the contract. And more than one court has been led into the error of holding that no such right of action existed — that a voluntary exercise of the right to refuse to continue performance necessarily involved a total termination of the contract.²

¹ This error is adverted to in *Anvil Mining Co. v. Humble*, 153 U. S. 540, 551. The plaintiff in that case had ceased to perform because of a breach of contract by the defendant and sought to recover damages. Brewer, J., delivering the opinion of the court, said (p. 551): "It is insisted, and authorities are cited in support thereof, that a party cannot rescind a contract and at the same time recover damages for his [its ?] non-performance. But no such proposition as that is contained in that instruction. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrong-doing of the other party has brought about. See, also, *Hayes v. Nashville*, 80 Fed. Rep. 641, 645.

² *Cox v. McLaughlin*, 54 Cal. 605; *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500, 502; *Palm v. Ohio, etc. R. R. Co.*, 18 Ill. 217; *Howe v. Hutchison*, 105 Ill. 501; *Lake Shore, etc. Ry. Co. v. Richards*, 32 N. E. Rep. 402 (Ill. Sup. Ct. 1892); *Jones v. Mial*, 77 N. C. 164. These cases hold that though a serious breach of contract will justify the other party in treating the contract as rescinded and so refusing to continue to perform, yet at least unless the breach amounts to actual prevention the party aggrieved cannot, if he ceases to perform, sue on the contract. The late Illinois case cited was, however, reversed on rehearing, and though somewhat limited in its language, perhaps overrules the earlier decisions in the same state. 152 Ill. 59, 80, 82. The first California decision was chiefly based on the early Illinois case. So in *Hochster v. De La Tour*, 2 E. & B. 678, counsel for the defendant, though their case did not require it,

Further, in order to exercise his right to rescind a contract, an injured party must indicate his election so to do by positive action,¹ but if he only wishes to refrain from performing his part of the contract, he is not seeking to assert an affirmative right, but standing on the defensive. He need do nothing except refrain from performing or receiving performance until he sues or is sued, when he should plead the cause which justifies his non-performance.² Of course he may waive this justification, but only by some positive action or estoppel.³

based their whole argument on the assumption that repudiation was equivalent to an offer to rescind, and that if the aggrieved party did not continue to hold himself ready and willing to perform he could not sue upon the contract.

In *Bethel v. Salem Improvement Co.*, 93 Va. 354, also, the plaintiff was not allowed to recover for loss of profits, after having ceased to perform owing to the defendant's breach of contract.

Citations need not be multiplied to prove the error of the foregoing decisions and the right of the plaintiff to cease performance upon the defendant's repudiation and yet sue upon the contract. *Cort v. Ambergate, etc. Ry. Co.*, 17 Q. B. 127; *Ripley v. M'Clure*, 4 Ex. 345; *Marshall v. Mackintosh*, 78 L. T. 750; *Leeson v. North British, etc. Co.*, 1r. R. 8 Co. L. 309; *Anvil Mining Co. v. Humble*, 153 U. S. 540; *McElwee v. Bridgeport Land, etc. Co.*, 54 Fed. Rep. 627 (C. C. A.); *Cherry Valley Works v. Florence, etc. Co.*, 64 Fed. Rep. 569 (C. C. A.); *Martin v. Chapman*, 6 Port. 344; *Baldwin v. Marqueze*, 91 Ga. 404; *Riley v. Walker*, 6 Ind. App. 622; *Lowe v. Harwood*, 139 Mass. 133; *Lee v. Briggs*, 99 Mich. 487; *Armstrong v. St. Paul, etc. Co.*, 48 Minn. 113; *Wharton v. Winch*, 140 N. Y. 287; *Reynolds v. Reynolds*, 48 Hun, 142.

Another instance of the confusion of ideas due to the improper use of words here criticised may be found in *Fox v. Kitton*, 19 Ill. 519, where the court says that there is no conflict between the views of Parke, B., and the decision of *Hochster v. De La Tour*, 2 E. & B. 678, since Parke, B., said in *Phillpotts v. Evans*, 5 M. & W. 475, 477: "The notice (that he will not receive the wheat) amounts to nothing until the time when the buyer ought to receive the goods, unless the seller acts on it in the mean time, and rescinds the contract." This, the Illinois court adds, "is in strict accordance with the principles recognized in . . . *Hochster v. De La Tour*." Now Parke was using the word "rescinds" in its true sense. What he meant and what he said was that the seller might at his option terminate the contract. The Illinois court thought he was using the word in the improper way in which Lord Coleridge did, and that his meaning was that the seller might, without himself performing, so act as to entitle himself to sue the buyer immediately for breach of the contract—a doctrine Parke expressly denied both in *Phillpotts v. Evans* and *Ripley v. M'Clure*, 4 Ex. 345, 359. The mistake made in *Fox v. Kitton* is repeated in *Kadish v. Young*, 108 Ill. 170.

¹ 14 HARVARD LAW REVIEW, 329.

² Where the ground of non-performance is an actual breach of contract by the other party, it is an obvious consequence of the rule of common-law pleading which required the plaintiff to allege and prove his own performance, that he would fail if he had not duly performed, though the defendant had not manifested any election. Changes in modern pleading cannot have affected the substantive law on this point. Where the ground of non-performance is repudiation or a prospective breach, there should be no difference, for the essential nature of the defence is the same.

³ See Langdell, Summary of Contracts, § 177; Harriman on Contracts, 163-167.

If it is clear that one party to a contract is going to be unable to perform it the other party should be excused from performing. The excuse is the same as in cases where a wilful intention not to perform is manifested. The party aggrieved is not going to get what he bargained for in return for his performance. It is immaterial to him, and it should be immaterial to the court whether the reason is because the other party cannot or because he will not do what he promised. Even if the prospective inability is due to *vis major* this should be true.¹

There is some difficulty in determining when it is sufficiently certain that one side of a contract will not be performed, to justify a refusal to perform the other side. Certainly if a party announces that he cannot perform, the other party is justified in taking him at his word.² Destruction of the subject-matter of the promise of one party is clearly a defence to the other.³ Transfer to a third person of property forming the subject-matter of the contract is not so clear, since it is possible that the grantor may recover the title in time to fulfil the contract, but ordinarily the chance seems so remote that the defence should be allowed.⁴ Insolvency of one party to a contract of sale is not always sufficient reason for refusal to perform by the other, for an assignee or trustee in insolvency or bankruptcy may find it for the advantage of the insolvent estate to

¹ Langdell, Summary, § 158, and see cases in the following notes.

² But it must be a clear and positive statement. *Smoot's Case*, 15 Wall. 36. See, also, *Re Phoenix Bessemer Steel Co.*, 4 Ch. D. 108.

³ 9 HARVARD LAW REVIEW, 106. Courts of equity in some jurisdictions have, however, established an exception to this rule in the case of contracts for the sale of real estate. 9 HARVARD LAW REVIEW, 111.

⁴ *Fort Payne, etc. Co. v. Webster*, 163 Mass. 134; *James v. Burchell*, 82 N. Y. 108. *Contra* are *Garberino v. Roberts*, 109 Cal. 125; *Webb v. Stephenson*, 11 Wash. 342. See, also, *Joyce v. Shafer*, 97 Cal. 335; *Shively v. Semi-Tropic, etc. Co.*, 99 Cal. 259. In the latter cases the court cites decisions establishing the doctrine that a man may contract to sell land which he does not own, and draws the inference that if the seller ceases to own land which is the subject of a contract it does not excuse the other party. The inference does not seem warranted. In *Ziehen v. Smith*, 148 N. Y. 558, at the time of performance there was an outstanding lien on the property, of which neither buyer nor seller knew at the time of entering into the contract. The buyer, without demanding fulfilment of the contract, at once brought suit to recover part of the price which he had paid. The court held he could not recover, as the incumbrance was one which was in the power of the vendor to remove, and he might have done so if requested. This decision was followed in *Higgins v. Eagleton*, 155 N. Y. 466. In the absence of any fraudulent concealment the determining question should be, Would a reasonable man be warranted in inferring that the contract would not be carried out? See *Farrer v. Nash*, 35 Beav. 167; *Brewer v. Broadwood*, 22 Ch. D. 105; *Lytle v. Breckenridge*, 3 J. J. Marsh. 663; *Payne v. Pomeroy*, 21 D. C. 243.

complete the bargain, and if so he ought to have that right.¹ But no one is obliged to give credit to one who is insolvent or bankrupt. Insolvency or bankruptcy affords a defence to any such contractual obligation, and payment may be required on delivery, though the contract expressly provides for a term of credit.² And if a contract is of such a nature that an assignee cannot carry it out, insolvency will excuse further performance by the other party.³ These seem to be the only cases in which prospective inability of one party is sufficiently certain to be a defence to the other party.

III.

The final question remains, When may the injured party bring his action upon the contract? If a technical declaration were as much thought of to-day as it was once, the question could hardly have become troublesome. From a technical point of view, it seems obvious that in an action on a contract the plaintiff must state that the defendant broke some promise which he had made. If he promised to employ the plaintiff upon June 1, the breach must be that he did not do that. A statement in May by the defendant that he was not going to employ the plaintiff upon June 1 can be a breach only of a contract not to make such statements. It is perhaps not wholly by chance that the doctrine of anticipatory breach has arisen as the exactness of common-law pleading has become largely a thing of the past; for the science of special pleading, in spite of the grave defects attending it, had the great merit of making clear the exact questions of law and fact to be decided.

The matter is so plain on principle that theoretical discussion is hardly possible⁴ except to make certain distinctions, which have

¹ Leake, *Contracts* (3d ed.), 753, 1095, and cases cited; *Rapplee v. Racine Seeder Co.*, 79 Ia. 220, 228; *Brassel v. Troxel*, 68 Ill. App. 131.

² See authorities above cited. Also, *Lennox v. Murphy*, 171 Mass. 370, 373; *Diem v. Koblitz*, 49 Ohio St. 41; *Pardee v. Kanady*, 100 N. Y. 121; *Dougherty Bros. v. Central Bank*, 93 Pa. 227; *Lancaster Bank v. Huver*, 114 Pa. 216. Mere doubts of solvency, even though reasonable, furnish no defence to the literal performance of a contract. *C. F. Jewett Publishing Co. v. Butler*, 159 Mass. 517.

³ Leake, *Contracts* (3d ed.), 1097; *Ex parte Pollard*, 2 Low. 411; *Chemical Nat. Bank v. World's Fair Exposition*, 170 Ill. 82.

⁴ It need hardly be said that the doctrine of anticipatory breach is peculiar to our law.

In Mommsen's *Beiträge zum Obligationenrecht*, Abtheilung, 3, § 4, it is said: "The obligation must be already due. So long as the time of maturity has not arrived, the obligor has always a defence in case the creditor should endeavor to enforce the obligation."

And in the typical case of one who regardless of his contract to sell and deliver in

not always been observed, and which, if observed, are a sufficient answer to the claims of practical convenience that furnish the only support for the advocates of the doctrine of anticipatory breach. It seems desirable, also, to explain certain early cases which have led to some confusion, and thereby show the lack of historical basis for the doctrine ; and of this first.

In *Y. B. 21 Edw. IV. 54*, pl. 26, Choke, J., says : " If you are bound to enfeof me of the manor of D. before such a feast, if you make a feoffment of that manor to another before the said feast, notwithstanding that you repurchase the property before the said feast, still you have forfeited your obligation because you were once disabled from making the feoffment." ¹ This and similar statements are repeated several times in the early books.²

What Choke was talking about was a bond with a condition. This appears from the case itself where his remark was made as an illustration, and so it was understood.³ At the present day a bond with a condition to convey before a certain day would be regarded as in substance the equivalent of a covenant to pay on or after the day the penal sum of the bond (for which the law would substitute appropriate damages) if a conveyance was not made before the day. That does not represent the early understanding of such an instrument. The words of a bond, which are still used, acknowledging an immediate indebtedness, and adding a proviso in which case the instrument is to become void, had a literal meaning for our ancestors. " A specialty debt was the grant by deed of an immediate right, which must subsist until either the deed was cancelled or there was a reconveyance by a deed of release." ⁴ It has been frequently pointed out that a debt was not regarded in our early law as a contractual right but a property right, and a deed creating a debt was not looked upon, as it is to-day, as a promise to pay money, but as a grant or con-

the future specific property to A sells and delivers it to B, *Oesterlen, Der Mehrfache Verkauf*, pp. 17, 18, says : " The temporary impossibility of performance due to the first delivery is wholly immaterial if it is removed at the proper time." . . . " When fulfilment is not made to the latter (*i. e.* A) at the proper time, then for the first time has a legal injury been done."

¹ In *Sir Anthony Main's Case*, 5 Coke, 20 b, 21 a, this passage is literally translated from the Year Book, and it is to Coke, probably, that the later currency of the citation is due.

² In 1 Rolle's Ab. 447, 448, under the title " Condition," this and several other similar cases are put. See, also, 5 Viner's Ab. 224.

³ This is evident, *e. g.* from Rolle's classification of the authority under " Condition."

⁴ 9 HARVARD LAW REVIEW, 56, by Professor Ames.

veyance of a sum of the grantor's money to the grantee.¹ Accordingly a bond was closely analogous to a mortgage, — a conveyance with a provision of defeasance attached. If the condition was or became impossible there remained an absolute debt created by the bond.² Choke's idea seems to have been that when the obligor of the bond sold the property, the condition became at that moment impossible of performance. There was, therefore, at that moment, by virtue of the bond itself, an absolute indebtedness, and this indebtedness, having once become absolute, could not subsequently be qualified. The condition could not be temporarily in abeyance.

Whether this view of the law was that generally taken by the contemporary judges, and, if so, when it gave way to a more modern conception, is not very material to this discussion, but it may be mentioned that Choke's statement seems inconsistent with the opinions of writers of authority not long afterwards.³ What is material to observe is that, whichever way the point is decided, these authorities have no bearing upon the question of the immediate right to sue upon the repudiation of a contract. It may safely be asserted that Choke and his contemporaries and successors would all have agreed that a covenant to convey land before a certain feast, or a covenant to pay damages if the covenantor failed to convey land before a certain feast, could in no event have been sued upon before the feast.

¹ Parol Contracts prior to Assumpsit, by Professor Ames, 8 HARVARD LAW REVIEW, 252; Pollock & Maitland, *Hist. Eng. Law* (2d. ed.), ii. 205; Langdell, *Summary of Contracts*, § 100.

² *Vynior's Case*, 8 Coke, 81 b, 83 a; Perkins, *Profitable Book*, §§ 736, 757; 1 Rolle's Ab. 419 (c) pl. 2; Ib. 420 (E) pl. 1, 2. The last passage reads: "If the condition of a bond or feoffment is impossible when it is made it is a void condition, but the obligation or feoffment is not void but single, because the condition is subsequent. But if a condition precedent be impossible when it is made the whole is void, for nothing passes before the condition is performed." Perkins (§ 757) gives a case of a condition originally possible, but subsequently becoming impossible.

³ Perkins, *Profitable Book*, § 800: "And there is a diversity when the condition is to be performed on the part of the feoffor or grantor, etc., and when on the part of the feoffee or grantee, etc. For when it is to be performed on the part of the feoffee or grantee, it behoveth him that he be not disabled at any time to do or perform the same."

§ 801. "But when the condition is to be performed on the part of the feoffor or grantor, although they are disabled to perform it at any time before the day on which it ought to be performed, yet if they are able to perform the same at the day, etc., it is sufficient, except in special cases." Illustrations are also given by the author.

This was written in the first half of the sixteenth century. Coke adopted the diversity (*Co. Litt.* 221 b); but neither author gives a satisfactory reason for it.

In the case put by Choke the condition was to be performed by the obligor, grantor of the bond.

When, therefore, Fuller, C. J., in a case recently decided by the Supreme Court of the United States, asserts, "It has always been the law that where a party deliberately incapacitates himself or renders performance of his contract impossible, his act amounts to an injury to the other party, which gives the other party a cause of action for breach of contract,"¹ it must, with deference, be said that the learned judge is mistaken. The mistake is perhaps more pardonable than it would otherwise be, had not an English court fallen into the same error. In *Ford v. Tiley*,² Bayley, J. in delivering the opinion of the court, draws the conclusion from some of the old authorities above referred to "that where a party has disabled himself from making an estate he has stipulated to make at a future day, by making an inconsistent conveyance of that estate, he is considered as guilty of a breach of his stipulation, and is liable to be sued before such day arrives."³ This was not, so far as appears, necessary to the decision of the case. The decision seems to have been correct, as will presently be shown, but Bayley's remark is noteworthy as the first statement in the English books authorizing the idea that an action may be brought on a promise before it is broken. It is to be noticed that this remark is confined to the case of an estate, and is not made as laying down a general principle of the law of contracts.⁴

In 1846 there were decided two cases in which a defendant was held liable for the breach of a promise to marry. In one of these cases⁵ the defendant's promise was alleged to be simply to marry the plaintiff; in the other case "to marry her within a reasonable time next after he should thereunto be requested."⁶ In both cases the defendant was held liable without any request by the plaintiff.

These cases did not profess to establish any general doctrine

¹ *Roehm v. Horst*, 20 Supr. Ct. Repr. 780, 787. It is also stated in the opinion (p. 783) that this was "not disputed." If so, the counsel for the defendant conceded more than they should.

² 6 B. & C. 325 (1827). But the error is pointed out, though perhaps not conclusively shown, in the able opinion of Wells, J., in *Daniels v. Newton*, 114 Mass. 530. It is also adverted to in the argument of counsel for the defendant in *Short v. Stone*, 8 Q. B. 358, 364, and in *Lovelock v. Franklyn*, 8 Q. B. 371, 376.

³ 6 B. & C. 325, 327.

⁴ Bayley's remark was repeated as representing the law in *Heard v. Bowers*, 23 Pick. 455, 460; but in that case, as the impossibility was not due to the voluntary act of the promisor, the rule was held inapplicable. In *Daniels v. Newton*, 114 Mass. 530, the *dictum* in *Heard v. Bowers* was repudiated.

⁵ *Caines v. Smith*, 15 M. & W. 189.

⁶ *Short v. Stone*, 8 Q. B. 358.

that a contract could be broken before the time for its performance. Moreover, Parke, B., twice expressly ruled the contrary at about this time;¹ and Lord Denman expressed a similar opinion.²

So the matter stood in 1852 when the case of *Hochster v. De La Tour*³ was decided. In that case the plaintiff had entered into a contract with the defendant to serve him as a courier for three months beginning June 1, 1852. On May 11, the defendant wrote to the plaintiff declining his services. The action was begun May 22, and, after a verdict for the plaintiff, objection was taken that the action was prematurely brought. Counsel for the defendant, however, argued — unnecessarily so far as the immediate case was concerned — that the plaintiff, having taken other employment, had terminated the contract. Lord Campbell, in delivering the opinion of the court in favor of the plaintiff, showed that the situation would be unfortunate if the plaintiff, as a condition of getting a right of action, must decline other employment and hold himself ready to perform until June 1. From this, apparently misled by the argument of counsel, Lord Campbell drew the conclusion that the plaintiff must have an immediate right of action; and also drew the conclusion from the earlier cases already referred to⁴

¹ *Phillpotts v. Evans*, 5 M. & W. 475, 477 (1839): "I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for delivery of the wheat, to see whether the defendant would then receive it. The defendant might then have chosen to take it, and would have been guilty of no breach of contract, for all that he stipulates for is that he will be ready and willing to receive the goods, and pay for them, at the time when by the contract he ought to do so. His contract was not broken by his previous declaration that he would not accept them; it was a mere nullity, and it was perfectly in his power to accept them, nevertheless; and, *vice versa*, the plaintiffs could not sue him before."

In *Ripley v. M'Clure*, 4 Ex. 345 (1849), Parke reiterated his statement that a notice before the time for performance could not be a breach of contract, but held that it might excuse the other party from continuing to perform.

² *Lovelock v. Franklyn*, 8 Q. B. 371, 378 (1846): "This distinction shows that the passage cited from Lord Coke is inapplicable; that proves no more on the point now before us than that, if an act is to be performed at a future time specified, the contract is not broken by something which may merely prevent the performance in the mean time." As Lord Denman had immediately before taken part in the decision of *Short v. Stone*, 8 Q. B. 356, it may be assumed he did not regard that decision as inconsistent with his later remarks.

In *Thomson v. Miles*, 1 Esp. 184, Lord Kenyon had said that it had been solemnly adjudged that if a party sells an estate without having title, but before he is called upon to make a conveyance, by a private act of Parliament, gets such an estate as will enable him to make a title, that is sufficient."

³ 2 E. & B. 678.

⁴ He adds the case of *Bowdell v. Parsons*, 10 East, 359, as establishing the proposi-

that incapacity before the time for performance had already been settled by decision to be a breach, neglecting to notice the distinction, hereafter adverted to, between a fixed future day and a day which may be fixed at any time in the present or future.

These two misapprehensions of Lord Campbell, for as such they must be regarded, make the case an unsatisfactory one. It has, however, settled the law in England,¹ and the doctrine for which it stands has been adopted in Canada,² in this country either by *dictum* or decision in the federal courts,³ and in the courts of a majority of the states in which the question has arisen.⁴ There are strong opinions to the contrary,⁵ however, and in many states

tion that "if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them." In fact, the contract in that case was to deliver upon request.

¹ *Frost v. Knight*, L. R. 7 Ex. 111; *Johnston v. Milling*, 16 Q. B. D. 460; *Synge v. Synge*, (C. A.) [1894] 1 Q. B. 466; *Roth v. Taysen*, 73 L. T. 628. See, also, *Danube*, etc. Co. v. *Xenos*, 13 C. B. (N. S.) 825; *Avery v. Bowden*, 5 E. & B. 714; *Reid v. Hoskins*, 6 E. & B. 953; *Roper v. Johnson*, L. R. 8 C. P. 167; *Brown v. Muller*, L. R. 7 Ex. 319; *Re South African Trust Co.*, 74 L. T. 769.

² *Dalrymple v. Scott*, 19 Ont. App. 477, 483.

³ *Roehm v. Horst*, 20 Sup. Ct. Repr. 780, affirming 91 Fed. Rep. 345 (C. C. A.), which affirmed 84 Fed. Rep. 565; *Grau v. McVicker*, 8 Biss. 13; *Dingley v. Oler*, 11 Fed. Rep. 372; *Foss*, etc. Co. v. *Bullock*, 59 Fed. Rep. 83, 87; *Marks v. Van Eeghen*, 85 Fed. Rep. 553 (C. C. A.). The Supreme Court long remained apparently undecided. *Dingley v. Oler*, 117 U. S. 490; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 264; *Pierce v. Tennessee*, etc. R. R. Co., 173 U. S. 1, 12. See, also, *Edward Hines Lumber Co. v. Alley*, 73 Fed. Rep. 603 (C. C. A.).

Clark v. National Benefit Co., 67 Fed. Rep. 222, must now be regarded as overruled.

⁴ *Wolf v. Marsh*, 54 Cal. 228; *Fresno*, etc. Co. v. *Dunbar*, 80 Cal. 530; *Poirier v. Gravel*, 88 Cal. 79; *Remy v. Olds*, 88 Cal. 537; *Thomson v. Kyle*, 39 Fla. 582; *Fox v. Kitton*, 19 Ill. 519; *Follansbee v. Adams*, 86 Ill. 13; *Kadish v. Young*, 108 Ill. 170; *Engesette v. McGilvray*, 63 Ill. App. 461; *Kurtz v. Frank*, 76 Ind. 594; *Adams v. Byerly*, 123 Ind. 368, 371; *Crabtree v. Messersmith*, 19 Ia. 179; *Holloway v. Griffith*, 32 Ia. 409; *McCormick v. Basal*, 46 Ia. 235; *Platt v. Brand*, 26 Mich. 173; *Sheahan v. Barry*, 27 Mich. 217; *Kalkhoff v. Nelson*, 60 Minn. 284, 287; *Bignall*, etc. Mfg. Co. v. *Pierce*, etc. Mfg. Co., 59 Mo. App. 673; *Claes*, etc. Mfg. Co. v. *McCord*, 65 Mo. App. 507; *Burtis v. Thompson*, 42 N. Y. 246; *Howard v. Daly*, 61 N. Y. 362 (*conf.* *Shaw v. Republic L. I. Co.*, 69 N. Y. 286, 293; *Ferris v. Spooner*, 102 N. Y. 10; *Nichols v. Scranton*, etc. Co., 137 N. Y. 471; *Stokes v. McKay*, 147 N. Y. 223; *Benecke v. Haebler*, 38 N. Y. App. Div. 344; *Union Ins. Co. v. Central Trust Co.*, 157 N. Y. 633, 643; *Hicks v. British Am. Assur. Co.*, 162 N. Y. 284; *Schmitt v. Schnell*, 14 Ohio C. C. 153; *Stark v. Duvall*, 7 Oklahoma, 213; *Zuck v. McClure*, 98 Pa. 541; *Hocking v. Hamilton*, 158 Pa. 107; *Mountjoy v. Metzger*, 9 Phila. 10; *Burke v. Shaver*, 92 Va. 345; *Lee v. Mutual*, etc. Assoc., 97 Va. 160; *Davis v. Grand Rapids*, etc. Co., 41 W. Va. 717.

⁵ *Daniels v. Newton*, 114 Mass. 530; *Carstens v. McDonald*, 38 Neb. 858; *King v. Waterman*, 55 Neb. 324; *Parker v. Pettit*, 43 N. J. L. 512, 517; *Stanford v. McGill*, 6 N. Dak. 536.

the question is still undecided,¹ so that the final outcome in America is not yet certain.

The reasoning in *Hochster v. De la Tour*,² already adverted to, illustrates a distinction, which it is important to observe—the distinction between a defence and a right of action. This seems obvious, but it is frequently lost sight of, as it was in that case. Every consideration of justice requires that repudiation or inability to perform should immediately excuse the innocent party from performing, nor is any technical rule violated if the excuse is allowed. But it does not follow from this that he has an immediate right of action. It is a consequence of allowing such an excuse that when he brings an action he shall not be defeated by reason of the fact that he himself has not performed, since that failure to perform was excused by the defendant's fault. But though the defendant cannot defeat the action on this ground, any other defence is as effectual as ever, and that the action is prematurely brought is an entirely different defence.

Another important and frequently neglected distinction is that between an action for restitution and an action on the contract. Since repudiation affords immediate cause for rescission it also entitles an immediate suit for the restitution specifically or in money equivalent of whatever has been parted with by the innocent party.³ Cases allowing this do not involve the consequence that an action might be brought at that time on the contract.

Again, it is often thought that to allow a plaintiff to sue and recover full damages before the time for the completion of all the defendant's performance is to allow the doctrine of anticipatory breach,⁴ yet this is not the case. As soon as a party to a contract breaks any promise he has made, he is liable to an action. In such an action the plaintiff will recover whatever damages the breach has caused. If the breach is a trifling one such damages cannot well be more than the direct injury caused by that trifling breach. But if the breach is serious or is accompanied by repudia-

¹ The question is referred to but expressly left open in *Day v. Connecticut, etc. Co.*, 45 Conn. 480, 495; *Sullivan v. McMillan*, 26 Fla. 543 (but see *Thomson v. Kyle*, 39 Fla. 582); *Maltby v. Eisenhauer*, 17 Kan. 308, 311; *Dugan v. Anderson*, 36 Md. 567; *Pinckney v. Dambmann*, 72 Md. 173, 182.

² 2 E. & B. 678.

³ 14 HARVARD LAW REVIEW, 322.

⁴ *Nichols v. Scranton, etc. Co.*, 137 N. Y. 471; *Union Ins. Co. v. Central Trust Co.*, 157 N. Y. 633; *Hocking v. Hamilton*, 158 Pa. 107, illustrate this. These cases are unquestionably right. They do not involve the question of anticipatory breach, though in each of them the court seems to have thought so.

tion of the whole contract, it may and frequently will involve as a consequence that all the rest of the contract will not be carried out. This may be a necessary consequence of the situation of affairs or it may result simply from the plaintiff's right to decline to let the defendant continue performance, since even if all the remaining performance were properly rendered, the plaintiff would not get substantially what he bargained for. The plaintiff is entitled to damages which will compensate him for all the consequences which naturally follow the breach, and therefore to damages for the loss of the entire contract. This is no different principle from allowing a plaintiff in an action of tort for personal injuries to recover the damages he will probably suffer in the future. If the cause of action has accrued, the fact that the damages or all of them have not yet been suffered is no bar in any form of action to the recovery of damages estimated on the basis of full compensation. This is law where the doctrine of *Hochster v. De la Tour* is denied, as well as where it is admitted.¹

Under this principle a right of action may accrue by breach of a subsidiary promise, long before the defendant's main performance is due, and the subsidiary promise may be an implied one. In any case where the plaintiff's performance requires the coöperation of the defendant, as in a contract of service or to make something from the defendant's materials or on his land, the defendant, by necessary implication, promises to give this coöperation, and if he fails to do so he is immediately liable though his only express promise is to pay money at a future day.² It seems settled, further, and perhaps by a fair implication, that there is in every bilateral contract an implied promise not to prevent performance by

¹ Mayne on Damages (6th ed.), 106 *et seq.*; Sutherland on Damages, §§ 108, 112, 113; *Pierce v. Tennessee, etc. Co.*, 173 U. S. 1; *Strauss v. Meertief*, 64 Ala. 299; *Howard Col. v. Turner*, 71 Ala. 429; *Ætna Life Ins. Co. v. Nexsen*, 84 Ind. 347; *Goldman v. Goldman*, 51 La. Ann. 761; *Sutherland v. Wyer*, 67 Me. 64; *Parker v. Russell*, 133 Mass. 74; *Cutter v. Gillette*, 163 Mass. 95; *Girard v. Taggart*, 5 S. & R. 19; *King v. Steiren*, 44 Pa. 99; *Chamberlin v. Morgan*, 68 Pa. 168; *Remelee v. Hall*, 31 Vt. 582; *Treat v. Hiles*, 81 Wis. 280.

The contrary decisions of *Lichtenstein v. Brooks*, 75 Tex. 196, 198; *Gordon v. Brewster*, 7 Wis. 355 (*conf.* *Treat v. Hiles*, 81 Wis. 280; *Walsh v. Myers*, 92 Wis. 397), are not to be supported.

² *Inchbald v. Western, etc. Co.*, 17 C. B. (N. S.) 733.

Ford v. Tiley, 6 B. & C. 325, was clearly correctly decided under this principle. The defendant promised to make a lease to the plaintiff as soon as he should become possessed of the property, which was then under lease to a third party. The defendant before the expiration of the prior lease executed another to the same lessee, thereby preventing possession reverting to him at the expiration of the previous lease.

the other party.¹ Such prevention will, therefore, in any case be an immediate breach of contract, and if of sufficiently serious character damages for the loss of the entire contract may be recovered. As countermanding work may have the legal effect of prevention in this country,² though it does not involve actual physical prevention, it will be a breach of contract at the time when a stoppage in the performance of the contract has been caused thereby.³

The time for the defendant's performance is frequently fixed in a contract, not by naming a definite day, but by some act to be done by the plaintiff — either a counter-performance or a request. If the defendant repudiates the contract, it excuses the plaintiff from doing a nugatory act, and, as in the case of any other condition which the defendant's conduct excuses, he cannot take advantage of its non-performance.⁴ He is deprived of nothing thereby, except what he has indicated a willingness to go without, for he has said that even if the request be made he will not heed it, or if the counter-performance be offered he will not accept it. The case is very different where the defendant promises to pay on a fixed day, or when an outside event happens. To hold him immediately liable in such an event is to enlarge the scope of his promise, and entirely without his assent. If he prevented the time for his performance from coming, his assent might be dispensed with, but not otherwise.⁵ The English cases prior to *Hochster*

¹ Bishop, Contracts, § 1431; Indian Contract Act, sect. 53. But see *Murdock v. Caldwell*, 10 Allen, 299.

² See *ante*, p. 422. See, also, *Cort v. Ambergate, etc. Ry. Co.* 17 Q. B. 127, 145.

³ *Hosmer v. Wilson*, 7 Mich. 294; *Chapman v. Kansas City, etc. Ry. Co.*, 146 Mo. 481.

⁴ The leading case for this well-settled doctrine is *Cort v. Ambergate, etc. Ry. Co.* 17 Q. B. 127. A few of the many other cases which might be cited are: *Hinckley v. Pittsburg Steel Co.*, 121 U. S. 264; *Dwyer v. Tulane, etc. Adms.*, 47 La. Ann. 1232; *Murray v. Mayo*, 157 Mass. 248; *Canda v. Wick*, 100 N. Y. 127.

The distinction here contended for is well brought out in *Lowe v. Harwood*, 139 Mass. 133. In that case there was a contract for an exchange of real estate. No time was fixed for performance. Before any tender or demand for performance the defendant repudiated the contract. Holmes, J., in delivering the opinion of the court, held that this "not only excused the plaintiff from making any tender and authorized him to rescind if he chose, but amounted to a breach of the contract. The contract was for immediate exchange, allowing a reasonable time for necessary preparations. In the absence of special circumstances, which do not appear, sufficient time had been allowed, even if any consideration of that sort could not be and was not waived by the defendant. The case is not affected by *Daniels v. Newton*, 114 Mass. 530, but falls within principles that have been often recognized."

⁵ In *Ford v. Tiley*, 6 B. & C. 325, the time for performance was to be fixed by the defendant's coming into possession of certain property — an event depending on outside contingencies, which the defendant prevented from happening as expected. In the

v. De la Tour,¹ which are cited in support of the doctrine of anticipatory breach,² may be satisfactorily explained on these principles with possibly one exception.³

A great many of the cases are upon contracts of marriage;⁴ and these cases may well be distinguished. Lord Cockburn said in *Frost v. Knight*: "On such a contract being entered into . . . a new status, that of betrothment, at once arises between the parties."⁵ When a man promises to pay money or deliver goods at a future day, all he understands, all a reasonable man would understand, is that he will be ready to perform on the day. When a man promises to marry, his obligation, as he understands it and as it is understood, is wider, and includes some undertaking as to his conduct before the marriage-day. If this be so, marriage with another than the betrothed is an immediate breach, not directly of the promise to marry, but of the subsidiary obligation implied from it. As this breach necessarily involves a loss of the marriage, full damages could be recovered. Lord Cockburn tries to apply the same line of reasoning to other contracts, saying, "The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the mean time he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests."⁶ But this is fanciful.

nature of the case, however, a party cannot prevent a day fixed by reference to the calendar from arriving.

¹ 2 E. & B. 678.

² *Bowdell v. Parsons*, 10 East, 359; *Ford v. Tiley*, 6 B. & C. 325; *Caines v. Smith*, 15 M. & W. 189. In *Bowdell v. Parsons* and *Caines v. Smith* the defendant promised to perform upon request, and later by making his own performance impossible excused the request. As to *Ford v. Tiley*, see *ante*. So in *Clements v. Moore*, 11 Ala. 35,—a decision before the days when anticipatory breaches were talked of,—the defendant was held liable for breach of a promise to marry on request without a request on his marriage with another than the plaintiff.

³ *Short v. Stone*, 8 Q. B. 358. Here the promise was to perform a reasonable time after request. The defendant, by making his own performance impossible, clearly dispensed with the necessity of a request as such. It does not seem so clear why he should forego the "reasonable time." Coleridge, J., avoided the difficulty by a strained construction of the declaration, holding the promise to mean after request made within a reasonable time. The other members of the court simply say the request is dispensed with.

⁴ *Frost v. Knight*, L. R. 7 Ex. 111; *Kurtz v. Frank*, 76 Ind. 594; *Adams v. Byerly*, 123 Ind. 368; *Holloway v. Griffith*, 32 Ia. 409; *Sheahan v. Barry*, 27 Mich. 217; *Burtis v. Thompson*, 42 N. Y. 246; *Burke v. Shaver*, 92 Va. 345. The distinction here suggested was referred to in *Stanford v. McGill*, 6 N. Dak. 536.

⁵ L. R. 7 Ex. 111, 115.

⁶ L. R. 7 Ex. 112, 114.

If true the action should be brought for breach of a promise to have the contract kept open. If there is such an implied obligation in any case there should be in case of negotiable paper, for in no other case is it more important that the promise should not be discredited before the time for performance. Yet it may be doubted if any court would apply the doctrine to bills and notes.¹

The reason most strongly urged in support of the doctrine of anticipatory breach is, however, its practical convenience. It is said that it is certain that the plaintiff is going to have an action, it is better for both parties to have it disposed of at once. It may be conceded that practical convenience is of more importance than logical exactness, but yet the considerations of practical convenience must be very weighty to justify infringing the underlying principles of the law of contracts. The law is not important solely or even chiefly for the just disposal of litigated cases. The settlement of the rights of a community without recourse to the courts can only be satisfactorily arranged when logic is respected. But it is not logic only which is injured. The defendant is injured. He is held liable on a promise he never made. He has only promised to do something at a future day. He is held to have broken his contract by doing something before that day. Enlarging the obligation of contracts is perhaps as bad as impairing it. This may be of great importance. Suppose the defendant, after saying that he will not perform, changes his mind and concludes to keep his promise. Unless the plaintiff relying on the repudiation, as he justly may, has so changed his position that he cannot go on with the contract without injury, the defendant ought surely to be allowed to do this.² But if the plaintiff is allowed to bring an action at once this possibility is cut off. "Why," says Fuller, C. J., "should a *locus pœnitentiæ* be awarded to the party whose wrongful action has placed the other at such disadvantage?"³ Because such is the

¹ Benecke v. Haebler, 38 N. Y. App. Div. 344. In Roehm v. Horst, 20 Supr. Ct. Repr. 780, 786, Chief Justice Fuller distinguishes the case of a note on the ground that the doctrine of anticipatory breach only applies to contracts where there are mutual obligations. This has not before been suggested, though in fact the cases where the doctrine has been applied have been cases of bilateral contracts. Lord Cockburn's line of reasoning is certainly as applicable to unilateral as to bilateral contracts. It would be interesting to know what Chief Justice Fuller would say to the case of a promissory note given in exchange for an executory promise, or of an instrument containing mutual covenants, one of which was to pay money on a fixed day, the party bound to the money payment having repudiated his obligation before it was due.

² Nilson v. Morse, 52 Wis. 240.

³ Roehm v. Horst, 20 Supr. Ct. Repr. 780, 787.

contract the parties made. A promise to perform in June does not preclude changing position in May.¹

But not only do logic and the defendant suffer, the very practical convenience which is the excuse for their suffering is not attained. A few illustrations from recent cases will show that as at present applied the doctrine of anticipatory breach is so full of pitfalls for the unwary as to be objectionable rather than advantageous practically. The doctrine is thus stated in the last English case where it was much considered. "It would seem on principle that the declaration of such intention (not to carry out the contract) is not in itself and unless acted on by the promisee a breach of contract. . . . Such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such."² The conception that a breach of contract is caused by something which the promisee does is so foreign to the notions not only of lawyers but of business men that it cannot fail to make trouble. If the promisee, after receiving the repudiation, demands or manifests a willingness to receive performance, his rights are lost. Not only can he not thereafter bring an action on the repudiation,³ but "he keeps the contract alive for the benefit of the other as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance

¹ The California Civil Code, § 1440, provides: "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party."

This necessarily implies that if the notice is retracted the obligation cannot be enforced without an offer to perform. Yet in California the doctrine of anticipatory breach, which in effect denies the right of retraction, is followed, and no reference is made to this section of the Code. The California cases are cited *ante*, p. 433.

The North Dakota Civil Code has copied in § 3774 this provision of the California Code, but the Supreme Court of North Dakota has denied the doctrine of anticipatory breach. *Stanford v. McGill*, 6 N. Dak. 536.

² *Johnstone v. Milling*, 16 Q. B. D. 460, 472, per Lord Bowen. The late authorities continually refer to the necessity of the promisee acting on the repudiation. What action is necessary is not stated. It is to be noticed, however, that in *H. Chester v. De La Tour*, 2 E. & B. 678; *Frost v. Knight*, L. R. 7 Ex. 111, and most of the other cases, there was no manifestation of election other than bringing an action.

³ *Zuck v. McClure*, 98 Pa. 541; *Dalrymple v. Scott*, 19 Ont. App. 477.

which would justify him in declining to complete it."¹ This is a pretty severe penalty imposed upon the injured party for not seizing the right moment. When A repudiates his promise, what is more natural or reasonable than for B to write urging him to perform. Yet if B does so, it seems not only does he lose his right of immediate action, but he is bound to perform his own promise, though he has reason to expect A will not perform his.²

In *Johnstone v. Milling*,³ the promisor stated that he could not get money enough to perform his promise. He made this statement "constantly in answer to the defendant's direct question, and at other times in conversation." It was held that this was not such a repudiation as would justify an action. Lord Esher, M. R., made the test, "Did he mean to say that whatever happened, whether he came into money or not, his intention was not to rebuild the premises,"⁴ as he had promised, and the other judges expressed similar views. A distinction between inability and wilful intention not to perform is not of practical value. As far as the performance of the contract is concerned they are of equal effect, and should be followed by the same consequences.

In *Dingley v. Oler*,⁵ the defendant had taken a cargo of ice from the plaintiff and agreed to make return in kind the next season, which closed in September, 1880. In July, 1880, the defendant wrote, "We must, therefore, decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash, at the price you offered it to other parties here (fifty cents a ton), or give you ice when the market reaches that point." At the time when this letter was written ice was worth five dollars a ton. One does not need expert testimony to judge what probability there is of ice going down before the close of September to one tenth of the price for which it was selling in July, and yet the court held

¹ *Frost v. Knight*, L. R. 7 Ex. 111, 112. Quoted as stating the law in *Leake, Cont.* (3d ed.) 752.

² In accordance with this rule in *Dalrymple v. Scott*, 19 Ont. App. 477, the plaintiff lost his case. The defendant had repudiated the contract. The plaintiff did not manifest an election to treat that as an immediate breach, but on the contrary testified that he would have been willing to have accepted performance after the repudiation. When the time for performance had passed he brought an action. Judgment was given for the defendant, because the plaintiff had not performed or offered to perform on his part.

³ 16 Q. B. D. 460.

⁴ Page 468. There were also other grounds of decision to which the present criticism is not intended to apply.

⁵ 117 U. S. 490.

the letter constituted no anticipatory breach of contract because the refusal was not absolute, but "accompanied with the expression of an alternative intention" to ship the ice "if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them." Surely a man must be well advised to know when he has the right to regard his contracts as broken by anticipation.

In contracts for the sale of goods when there is a repudiation of the contract before the time for performance, the question often arises as to the basis on which the plaintiff's damages are to be calculated. It is often thought that the decision of this question turns on whether a breach of the contract is made at the date of the repudiation or at the date when the goods were to be delivered. But this is not so. Even though the doctrine of anticipatory breach is not adopted the plaintiff should, if he knows the contract is going to be broken, as much as if it has already been broken,¹ take any reasonable action to mitigate the damages which the defendant's action will cause, so that the price of the goods at the time when they should have been delivered will not necessarily be the sole criterion of the loss. On the other hand, even though the breach be regarded as having occurred at the time of repudiation, yet it was a breach of a contract to deliver at a later day, and, if it was not a reasonable thing under the circumstances to take some action at the earlier day the damages must be calculated on the basis of the price of the goods at the time when delivery should have been made. By no reasoning can the contract be treated as a contract to deliver goods at the date of the repudiation.²

Samuel Williston.

¹ This is doubtless contrary to the early cases (*Leigh v. Patterson* 8 Taunt. 540; *Phillpotts v. Evans*, 5 M. & W. 475), but seems in accord with reason and with the principle of the American cases cited, *ante*, p. 422.

² The modern decisions on the point seem to have been made exclusively by courts which recognize the doctrine of anticipatory breach. Some of these decisions go very far in requiring the plaintiff to take affirmative action at his own risk. See *Brown v. Muller*, L. R. 7 Ex. 319; *Roper v. Johnson*, L. R. 8 C. P. 167; *Roth v. Taysen*, 12 T. L. R. 211 (C. A.); *Re South African Trust Co.*, 74 L. T. 769; *Ashmore v. Cox*, [1899] 1 Q. B. 436; *Roehm v. Horst*, 20 Sup. Ct. Repr. 780.

THE NEGOTIABLE INSTRUMENTS LAW. A WORD MORE.

UNDER ordinary circumstances Judge Brewster's "Defense of the Negotiable Instruments Act" in the Yale Law Journal for January would be allowed to close the very friendly controversy begun by a criticism of that Act in the December number of this REVIEW. But it is so much wiser and simpler to avoid the commission of legislative errors than to correct them subsequently that the writer deems it his duty to add to his former paper this short supplement by way of meeting some of the arguments of the learned Chairman of the Committee on Uniform Laws, and of reinforcing some of his own criticisms.¹

As to the objections to sections 20, 36-2 and 3, 49; 66, 68, 137, and 175 it seems unnecessary to say anything more than that his criticisms still seem to the writer to be valid. In dealing with the other sections criticised, he will follow the order of the Act.

By SECTION 3-2 an order or promise is not rendered conditional by "a statement of the transaction which gives rise to the instrument." These very general words, Judge Brewster tells us, were intended to cover the specific case of a "chattel note," that is, a note stating that it "is given for a chattel which is to be the property of the holder until the note is paid." He tells us further that this sub-section could not apply to a note containing the words, "Given as collateral security for A's debt to the payee," because such an instrument "contains notice on its face that it is not an unconditional promise to pay." But that is the precise ground upon which "chattel notes" are held to be non-negotiable in Massachusetts. In *Sloane v. McCarthy*,² Field, J., said: "The obligation of the defendant to pay the money is in legal effect conditional upon the title vesting in him when the money is paid in full, and this condition appears on the face of the contract." The learned

¹ Since the sections criticised and the criticisms must stand or fall upon their intrinsic merits or demerits, any allusion to the critic's qualifications by reason of his previous training or experience would seem to be irrelevant. But since the learned Chairman draws therefrom the inference that "a fulness of expression amounting to prolixity" would be demanded, in order to give effect to the writer's strictures upon the Act, it is right to say that the adoption of his proposed amendments would shorten the Act by something more than a dozen lines.

² 134 Mass. 245, 246.

Chairman demonstrates, therefore, by his own reasoning, that this sub-section must fail to work in the very case for which it was framed.¹

SECTION 9-3. Fictitious payee. In his criticism of this provision the writer tried to make it clear that, as a matter of actual experience, one who makes an instrument payable to a fictitious person always indorses it in the name of that person before issuing it, and that such an instrument is in effect, though not in form, the same as one payable to the order of the drawer or maker. By the Revised Statutes of New York, of 1830, a note payable to the order of the maker was declared to be payable to bearer, and was negotiable by delivery merely, without indorsement. This legislation was copied in at least nine states.² But it has been repealed in New York, North Dakota, Oregon, and Wisconsin by section 184 of the Negotiable Instruments Law, which declares that a note payable to the maker's own order "is not complete until indorsed by him." The recommendation of the writer is that a bill or note payable to the order of a fictitious person be dealt with in the same way by enacting that such a bill or note, when indorsed by the drawer or maker in the name of the fictitious person, but only when so indorsed, shall have the effect of paper payable to the order of, and indorsed by, the drawer or maker. Suppose two notes, one payable to the order of a fictitious person and one payable to the order of the maker, but neither of them indorsed, to be lost or stolen and to come to the hands of an innocent purchaser. Where is the logic or the justice in a statute which makes the maker liable in the one case, but not in the other?³

¹ It may be, as the writer believes it to be, an error to regard a "chattel note" as a conditional promise. But courts which commit this error will probably agree with Judge White, the only judge who has passed upon section 3-2, that this provision "has no application" to such a note. On this point Judge White's opinion was not impeached by the reversing opinion in 50 N. Y. Ap. Div. 66.

² Rand. Neg. Pap. (2d ed.) sect. 153 n., 401.

³ If Judge Brewster's startling suggestion that notes payable to the order of unincorporated associations or the estates of deceased persons are payable to bearer by force of this section 9-3, this provision is far more mischievous than the writer had supposed. Is a note payable to the order of a joint stock company unincorporated, or to the order of John Smith & Co., for a partnership is an unincorporated association, payable to bearer? This is incredible. There is a *dictum* in *Lewisohn v. Kent*, 86 Hun, 257, that a note payable to the order of the estate of A is payable to bearer. But surely it is a perversion of language to call the payee in such a note a fictitious or non-existing person. In *Shaw v. Smith*, 150 Mass. 166; *Peltier v. Babilion*, 45 Mich. 384, such a note was properly interpreted as a note payable to the legal representa-

SECTIONS 9-5 and 40. Special indorsement of paper payable to bearer. Prior to the Bills of Exchange Act an instrument payable to bearer (or indorsed in blank), although afterwards indorsed specially, was still negotiable by delivery, as if the special indorsement were not upon it. Hence, even though the bill had been lost by, or stolen from, the special indorsee, any honest purchaser from the finder or thief acquired an indefeasible title to the paper. This was thought to be unjust to the special indorsee, since the buyer had notice on the face of the bill that it had become the property of the special indorsee, and ought, therefore, to make out his right through an indorsement or assignment by the special indorsee. To remedy this injustice was the object of section 8-3 of the English Act, which is reproduced in section 9-5 of the American Law.

The objection to this provision is this: If the special indorsee transfers the instrument by delivery merely, the transferee not being an indorsee, is not a holder¹ and not being a holder cannot, under section 48, strike out indorsements, and so, in order to recover against parties antecedent to the special indorser, must sue in the name of the special indorsee.

Section 40 of the American statute has no counterpart in the English Act, and, by providing that an instrument payable to bearer, although indorsed specially, "may nevertheless be further negotiated by delivery," seems to the writer to nullify the innovating section 9-5, and to leave the law as it was in England before 1882. Judge Brewster seeks to avoid this result by reading section 40 as if it contained, after the word 'negotiated,' the words "by the special indorsee," thus restricting the further negotiation, by delivery to a delivery by him. The suggested explanation is to the writer, far from convincing. He cannot escape the conviction that it is an afterthought. Had the framers of the Act fully realized that section 9-5 was an innovation, and that the language of section 40 was almost identical with that used by judges and text-writers to define the superseded doctrine,² one must

tive of A. Mr. Chalmers, who drew the English Act, says that a note payable to a deceased person is payable, since the Act, as it was before it, to his personal representative. Chalmers, *Bills of Exch.* (5th ed.) 23, 24.

¹ N. I. L. sect. 191.

² "Continues to be assignable by mere delivery." Chitty, *Bills* (11th ed.), 173. "Is transferable by mere delivery." Story, *Prom. Notes* (7th ed.), § 139. "Is afterwards negotiable by mere delivery." 4 *Am. & Eng. Encycl.* (2d ed.) 252. "Remains transferable by delivery." 2 *Rand. Neg. Pap.* § 705. "The negotiability is not restrained." Chalmers, *Dig.* (1878) 96.

believe that, either they would have followed the English Act, and omitted section 40, or else have abandoned the language of the discarded rule along with the rule itself. Furthermore, to interpolate the additional words is to take an unwarrantable liberty with the statute.

SECTION 22. Indorsement by an infant. The learned Chairman informs us that this section is the same in effect as the corresponding section of the English Act. Other members of his committee assured the writer that the purpose of this section was to give the infant's indorsee an indefeasible title to the instrument. This is not the effect of the English Act. If the framers of this section are not agreed as to its scope, its reference back to the committee for revision would seem to be in order.

In SECTION 29 an accommodation party is defined as one who signs "without receiving value therefor, and for the purpose of lending his name to some other person." This definition was criticised by the writer as excluding the case where the signer receives a commission for lending his name, and the omission of the words "without receiving value for and" was recommended. Judge Brewster shows that the language in this section is the current definition of the books. But this does not meet the criticism. It may indicate only that he and his colleagues erred in good company. To take a concrete case. A offers B \$10 if he, B, will sign a note of \$1000 for A's accommodation. B accepts the \$10 and signs the note. Can any one seriously doubt that B is an accommodation party? If he is, the definition in this section is erroneous.

SECTION 34. The definition of indorsement. A note, a bill, and an acceptance are carefully defined in the Negotiable Instruments Law. To the writer's criticism upon the absence of a definition of an indorsement which would remove the conflict of decisions in cases where the payee writes: "I assign this note to B," or "I guarantee the payment of this note to B," Judge Brewster replies that "the liability of a party on a peculiar indorsement which is outside of negotiability must be settled by a court." But the very point in controversy is one of negotiability, as it was in the case of notes containing a promise to pay attorney's fees. It is unfortunate that an excellent opportunity to unify the law was neglected.¹

¹ In ten states a payee who transfers a note by writing on the back, "I assign this note to X," assumes the liability of an ordinary indorser. In six states such an assignor is not an indorser. In thirteen states the assignee, like an indorsee, acquires

SECTION 37. Restrictive indorsement. A, the holder of a note payable to his order, sells it to B and is about to indorse it to him, but, at B's request, indorses it to X in trust for B, instead of to B directly. At the maturity of the note the maker is insolvent, but A is solvent. By this section, X, the indorsee, may sue any one that his indorser can sue. In other words, he may sue the insolvent maker, but he cannot sue the solvent indorser, A. Judge Brewster sees no injustice to B in the inability of X, his trustee, to sue A, upon the latter's indorsement. Let us hope that the learned judge may never find himself in B's situation.

SECTION 64. Anomalous indorser. Judge Brewster seems to have misapprehended the writer's criticism upon this section. If A makes a note payable to X or order, gets B to indorse it and delivers it to X in exchange for goods, B is liable, under this section, to X and all subsequent parties. If, however, A accepts a bill drawn by X, payable to the order of X, gets B to indorse it, and delivers it, as before, to X for goods purchased, B, under this section, is not liable to X, but only to subsequent holders. And yet the business relations of A, B, and X are obviously identical in the two cases. In each X sells to A on credit, trusting to the responsibility of both A, the buyer, and B, the surety. The amendment suggested by the writer¹ secures to X the just protection which this section in its present form denies him.

SECTION 65-4 makes the novel distinction that, while a transferor by delivery is liable on his warranty of genuineness only to his immediate transferee, an indorser without recourse, because his name is on the instrument, is liable to all subsequent holders. This distinction was criticised on the ground that the warranty in both cases was extrinsic to the instrument, being merely the warranty of a vendor, and therefore running to the vendee only. The learned Chairman makes merry with the critic by quoting a statement from the Summary of Ames's Cases on Bills and Notes² as the first printed expression of the idea that an indorser without recourse is responsible as a warrantor to the indorsee and subsequent holders. The writer frankly confesses that a youthful indiscretion, commit-

title free from equities good against the assignor. In two states the assignee takes subject to such equities.

In three states a payee who transfers a note by writing on the back, "I guarantee the payment of this note to X," is liable as an indorser. In ten states he is not so liable. In thirteen states the transferee, like an indorsee, acquires a title free from equities good against the transferor. In three states and in the Supreme Court of the United States, the transferee takes subject to such equities.

¹ 14 HARVARD LAW REVIEW, 250.

² 840, 882.

ted so long ago that it had passed from his memory, made him fair game for the alert sportsman. But, after all, he is not so black as he is painted. In his callow days he never entertained the heresy that the indorser without recourse was liable on the instrument, or that there was any difference between his obligation and that of a transferor by delivery. The liability of each is described in the Summary in the same forms and as extrinsic to the instrument. Nor did he consider that the obligation of either was negotiable. He regarded the warranty as an assignable chose in action, with this peculiarity, that it passed, with the bill or note as an incident, without any express assignment.¹ The writer is indebted to Judge Brewster for recalling to his mind this forgotten conception, for it suggests an additional objection to this sub-section. The distinction introduced between the transferor by delivery and the indorser without recourse must rest upon the fact that the name of the latter is upon the paper, and upon the assumption that such an indorsement is like a regular indorsement, except that the liability is limited to a warranty of genuineness and the like, and, therefore, runs in favor of all subsequent holders.² In other words, the indorsement is negotiable, and not merely assignable. A concrete case illustrates the difference. The holder of a bill containing several prior indorsements is induced by fraud to transfer it by an indorsement without recourse. The fraudulent indorsee transfers it to a holder in due course. The signature of one of the prior indorsers turns out to be a forgery. If the warranty of the defrauded indorser is merely an extrinsic, assignable chose in action, the holder in due course, having only the rights of the fraudulent indorsee, cannot charge him; if, on the other hand, as this section of the act must mean, his obligation is a qualified negotiable indorsement, he is chargeable by the holder in due course. This result will hardly commend itself to any one.

SECTION 70. Presentment for payment. To the unqualified statement in this section that "presentment for payment is not necessary to charge the person primarily liable" the writer objected that an exception should be made in the case of bank notes

¹ He agrees now with Dillon, J., that an express assignment is necessary. Watson v. Chesire, 18 Iowa, 202.

² Similarly, in section 66, the two liabilities of the regular indorser — the warranty of genuineness and the engagement to pay upon due notice of dishonor — are grouped together, and made to run in favor of all subsequent holders, as if both arose upon the instrument itself.

and certificates of deposit. This objection seems to the learned Chairman impractical. An objection which gives effect to the express intention of the parties and has the support, as to certificates of deposit, of the decisions in at least nine states, would seem to be sufficiently practical.

SECTION 119-4. It is said in defence of this sub-section that it relates only to acts between the parties, and that the holder's acceptance of a horse in satisfaction of a note, if before maturity, does not discharge the maker as against a holder in due course. This is very sound law, but, with all deference, this sub-section declares just the opposite. The language is that by such an accord and satisfaction "a negotiable instrument is discharged." If it is discharged the maker can never be charged upon it. In all the other sub-sections of this section the discharge is complete and final.

SECTION 120. Judge Brewster says that "discharge of a prior party" in sub-section 3 means a discharge "by the holder." To add the words "by the holder" seems to the writer as unjustifiable as the unsuccessful attempt that was made in Vagliano's case¹ to add to the section of the English Act relating to fictitious payees the words, "to the knowledge of the acceptor." Furthermore, if the words were added, to what possible case would this paragraph apply which is not covered by the other paragraphs of this section? Finally, if the words are added, this sub-section would still be indefensible, for it certainly discharges the accommodated indorser of a note, if the holder, with knowledge of the accommodation, should release the accommodating maker. This would be a shocking result and contrary to all the reported decisions on this point. This same illustration demonstrates the inaccuracy of paragraphs 5 and 6 of this section.

SECTION 186 provides that the holder's failure to present a check discharges the drawer only to the extent of loss caused by the delay. To the writer's criticism that, under section 89, the failure to give the usual prompt notice of dishonor of a check discharges the drawer irrespective of any loss to him, and that this is unjust, the learned Chairman replies, that no harm is done, for the holder may sue upon his original claim. But in all other cases a creditor who, by his laches, discharges his debtor from liability on a bill given in conditional payment of a debt, forfeits also all right to the debt. Furthermore, suppose a check to be given in abso-

¹ 1891, App. Cas. 144.

lute payment of the drawer's debt, or in consideration of the payee's release of a claim against a third person. Surely, in either of these cases, the holder, who loses his right on the check, has lost everything.

The writer's criticisms upon the new code may be summed up as follows : —

Section 3-2 is either useless or provocative of litigation. Section 36-2 might well be merged with section 36-3. Section 137 crystallizes an unscientific conception without any compensating advantage.

Section 29 is an erroneous definition. Section 34 is an inadequate definition. Sections 9-5 and 40 are repugnant. Section 68 introduces an unprecedented and arbitrary distinction. Section 70 would settle a conflict of decisions against the majority opinion, which is that of the chief commercial states. Section 175 copies the blunder of the English Act which codified an overruled decision.

Sections 9-3, 20, 37, 49, 64, 65-4, 66, 119-4, 120-3, 120-5, 120-6, and 186, taken with section 89, establish rules opposed alike to justice and to well-established law. Their enactment must inevitably be followed, sooner or later, by additional legislation to remedy the evils they would introduce.

The writer desires to repeat his opinion that the general adoption of the new code, properly amended, would be greatly to the advantage of the mercantile community. But unless the statements in the preceding two paragraphs can be disproved, the passage of the Act in its present form in a single additional state should be an impossibility.

James Barr Ames.

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THE COLUMBIA LAW REVIEW. — It is with pleasure that we greet the *Columbia Law Review*, published by students of the Law School of Columbia University. The editors are to be congratulated on the excellence of their first issue; from such a beginning a prosperous future seems assured. To this latest arrival the HARVARD LAW REVIEW extends its best wishes.

MUNICIPAL LIABILITY FOR THE TORTS OF FIRE-BOATS. — After a re-argument ordered in the spring of 1899, the case of *Workman v. New York* has finally been decided by the Supreme Court of the United States, the court being as nearly as possible evenly divided. 21 Sup. Ct. Rep. 212. The single question at issue was whether the city of New York was liable, in a proceeding in admiralty *in personam*, for an injury to another vessel caused by the negligence of those in charge of a city fire-boat on her way to a fire. The fire-boat was trying to reach a fire at the head of the slip next to pier 48, East River, and through mismanagement in entering the slip struck the barkentine, *Linda Park*, moored at the outer end of the pier. The decision reached is that the city was liable, and the applicability is denied in admiralty of that common-law rule which regards the service of a fire department as of a governmental nature, such as to exempt cities from liability for the negligent acts of its servants engaged in this service. The reason given by Mr. Justice White, in the majority opinion, for not applying the common-law doctrine is "that in the maritime law the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has juris-

diction." This may be admitted ; but Mr. Justice Gray and the dissenting judges seem to be right in showing that this is not conclusive. All that can be meant by the remark quoted, if it is a true summary of the authorities, is that the owner of a private vessel is not exempt from liability because she was engaged at the moment of her wrongdoing in the useful occupation of putting out fires and the like. *The Blackwall*, 10 Wall. 1 ; *The Clarita and The Clara*, 23 Wall. 1. These decisions do not touch the question of the rule of *respondeat superior* in regard to governmental agents of municipal corporations. Why should not that rule be applied in admiralty ? The personal liability of the owner of an offending vessel, based upon his ownership, is not different from the responsibility under the rule of agency based upon the relation of master and servant. This is admitted by Mr. Justice White. If, then, the court of admiralty is enforcing the general law of agency, it is not easy to see how that court can consent to apply part of that law and yet refuse to apply the whole of it. The fire-boat personified was the servant of the city as well as were the firemen ; the liability of the city for their negligence should not vary according as the plaintiff chose a court of common law or a court of admiralty.

One other point should not pass unnoticed. In the last paragraph of the majority opinion the court carefully guards itself from admitting the general rule of common law which exempts a city from responsibility for the torts of its fire department. In the courts of the states, however, from Massachusetts to Washington, *Hafford v. New Bedford*, 16 Gray, 297 ; *Lawson v. Seattle*, 6 Wash. 184, this rule is fixed, if there is anything fixed in the law of municipal corporations. The doubt suggested by the court must be deemed unfortunate because of the unsettling effect which it must have upon actions brought in the federal courts. It also raises a grave question whether this matter is not one of local law, in which the law of the respective states should be followed by the federal courts. If it is not, the circuit judges are left in an unenviable position.

RIPIARIAN RIGHTS UNDER THE FIFTH AMENDMENT. — A question of considerable importance as to the rights of those who own land abutting on navigable waters has lately been passed upon by the Supreme Court of the United States. *Scranton v. Wheeler*, 21 Sup. Ct. Rep. 48. The federal government, for the sole purpose of facilitating navigation in the St. Mary's River, built a pier in the submerged land of the river parallel to the shore and opposite the riparian property of the plaintiff. This pier virtually destroyed all means of access from the river to the plaintiff's riparian land, for between the pier and the shore there was left a waterway only five feet in depth. The plaintiff claimed the right to land his freight upon this government pier, and upon being refused brought an action of ejectment ; the question therefore arose as to whether the destruction of the means of access from the plaintiff's land to navigable water was such a taking of private property for public use without just compensation as was forbidden by the Fifth Amendment. The court held that the riparian owner's private right of access must give place to the right of the government to improve the navigation of public waters, and thus that there was not any taking of private property for public use, but only a consequential injury to a right which must be enjoyed in subjection to the rights of the public. The dissenting opinion was based on

the contention that this and other riparian rights were to be determined by state law, and thus, if by the rule in the particular state where the plaintiff's land was situated this right of access was considered to be property, compensation was requisite, the power of Congress to make provision for interstate commerce being subject to the Fifth Amendment.

In the state courts there is a hopeless conflict on the question whether this right of access is property or not. Lewis, *Eminent Domain*, 2d ed. § 77 *et seq.* And in general the cases do not seem to turn on the ownership of the bed of the stream, as might at first be supposed. The majority in the principal case appears to have considered themselves bound by the case of *Gibson v. United States*, 166 U. S. 269, where it was held that the destruction of the means of access to the Ohio River during seven out of every twelve months by a submerged dike put up to improve navigation was not protected by the Fifth Amendment. Indeed this decision would seem to conclude the present case. To the contention of the minority that the determination whether this is a "taking of property" should be left to the state courts, the obvious reply is that this is essentially a federal question — whether an improvement to navigation which is authorized by the "Commerce Clause" and which impairs the value of the adjoining land is such a "taking of property" as was contemplated by the Fifth Amendment. Besides, most of the cases relied on by the minority in this regard are those where the federal court considered itself bound by state adjudications upon the question whether the abutter or the public owned the fee of a navigable river. *Shively v. Bowlby*, 152 U. S. 1. Such a rule in considering questions of the law of property is quite a different matter from saying that a state's interpretation of a clause in its own constitution shall be conclusive upon the Supreme Court in interpreting a similar clause in the Federal Constitution. And considering the question upon those broad principles which should govern in constitutional questions, it may well be said that a riparian owner holds his property subject to the implied condition in regard to his ownership that the sovereign may make improvements in facilitating navigation even though the abutter suffers thereby a consequential injury.

SECRET ANTENUPTIAL CONVEYANCES. — In both England and America, it has long been recognized that a secret antenuptial conveyance, without consideration, by a wife is a fraud on her intended husband's marital rights, and may be set aside in equity. In England this doctrine has never been extended to cover such conveyances by the husband, but this is largely due to the fact that the custom of jointure which prevails there to a great extent has rendered dower a comparatively unimportant right. In the United States, however, where this system is not generally adopted, courts have usually set aside such conveyances by the husband. *Chandler v. Hollingsworth*, 3 Del. Ch. 99. A recent decision by the Ohio court is in line with the prevailing view. A widower with three sons, just before a second marriage, and without the knowledge of his intended wife, made a gratuitous conveyance of a portion of his land to his sons. It was held that his widow was nevertheless entitled to dower in the land conveyed. *Ward v. Ward*, 57 N. E. Rep. 1095.

The true principle underlying this doctrine has only recently been pointed out. In early times, the courts rested it upon deceit and disap-

pointment of expectations; later it was put upon the ground that, during the marriage treaty, there existed an inchoate dower interest. *Chandler v. Hollingsworth*, *supra*. The accepted view at present, however, is that during the betrothal the parties stand in so close and confidential a relationship as to give rise to a duty to exercise the utmost good faith. The intended wife has the same interest as the husband in the family establishment and in all that concerns its future support and maintenance. Such an undisclosed conveyance is therefore inconsistent with the good faith and honesty which the relations of the parties demand. *Arnegard v. Arnegard*, 7 N. Dak. 475.

The question has come up as to how far other circumstances, as a desire to make provision for children by a former marriage, should have weight in equity to remove the imputation of bad faith. It has been held that a reasonable provision for the grantor's children will be protected so long as it is not done solely to defeat the dower rights of the intended wife. *Fennessey v. Fennessey*, 84 Ky. 519. In general, however, courts treat mere non-disclosure as conclusive. It is to be remembered that even if the stricter view be adopted, a man may still make whatever provision he thinks fair for his children. Only in carrying out this moral duty he must not disregard the higher duty of good faith with his intended wife, and must at least inform her of his intention. Again, if such qualifications are considered, it is extremely difficult to draw a satisfactory line. Whether this disadvantage is outweighed by the possibility of injustice in a few cases is only a question of expediency. On either view, however, the decision in the principal case may be supported.

RESTRICTIONS UPON THE CY-PRES DOCTRINE. — An interesting question of how far the *cy-près* doctrine will be applied was involved in a late English decision. A testator bequeathed certain property to trustees to pay the income to his wife for life, remainder to his son for life, and, in the event of his son's dying without issue, the property to go to the Draper's College, a charitable institution. After the testator's death, but before the death of his son without issue, the college ceased to exist. The court held that the fund should be applied *cy-près*. *In re Soley*, 17 Times L. R. 118. The case would seem clearly right were it not that a distinction has been made as to whether the gift has ever become vested in the institution. If a general charitable intention can be inferred, but the institution chosen as the mode of effecting this charitable purpose ceases to exist after it has become entitled to the fund, the intention will be carried out *cy-près*. *In re Slevin*, [1891] 2 Ch. 236. But where the institution ceases to exist during the testator's lifetime, it has been treated as an ordinary lapsed legacy, and the doctrine of *cy-près* has not been applied. *In re Ovey*, 29 Ch. D. 560. The authority upon which this distinction rests is at least questionable. The modern cases that have developed it are based upon a misconception of several earlier cases where obviously the doctrine of *cy-près* had no application because the testator in them showed no general charitable intent, but only a desire to benefit a particular institution. 1 Jarman on Wills, 4th ed. 246. However, although the later cases do not refer to it, there is a still earlier case which bears out the distinction. *Clark v. Foundling Hospital*; Highmore on Mortmain, 552.

Whether on principle the distinction is to be considered sound depends largely upon the views that are held as to the desirability of the *cy-près* exception. Those who look upon it as a means of carrying into effect the obvious intent of a testator, and, as such, a rule worthy of the fullest application, cannot but regard this distinction as arbitrary and unjust. On the other hand, the holders of the opposite view suggest that to apply the *cy-près* rule where the fund has once vested in a charity is only to leave the property in the hands of the present holder, whereas, where the object fails in the testator's lifetime, to apply this doctrine is to deprive the heir of property which has naturally fallen to him. But when it is remembered that the only object of the rule is to do justice to the testator's expressed wishes, it would seem that the distinction is hardly valid.

The principal case may, however, be supported even under the stricter rule. The interest which the college had at the testator's death was a contingent remainder, and, although contingent, the remainder was a vested property right. So it is possible to say that the fund had become vested in charity before the institution ceased to exist.

DAMAGES IN AN ACTION FOR DECEIT. — Until recently the authorities in this country were practically unanimous in holding that the damages in an action on the case for a fraudulent misrepresentation were the same as in an action for a breach of warranty. *Morse v. Hutchins*, 102 Mass. 439; *Page v. Parker*, 43 N. H. 363. However, in 1889 the Supreme Court of the United States, with hardly any discussion of the authorities, held that the measure of damages was, not what the plaintiff might have gained had the representation proved true, but what he had lost by being deceived into the purchase. *Smith v. Bolles*, 135 U. S. 125. The doctrine of this decision has since been applied in a few cases. *Rockefeller v. Merritt*, 76 Fed. Rep. 909 (C. C. A. 8th Cir.); *Hugh v. Berrett*, 148 Pa. St. 263. It also prevails in England. *Peck v. Derry*, L. R. 37 Ch. D. 541. On the other hand, most of the state courts that have since passed upon the question have adhered to the older rule. *Gustafson v. Rustemayer*, 70 Conn. 125; *Fargo Gas Co. v. Fargo Gas & Electric Co.*, 59 N. W. Rep. 1066 (N. D.). In this state of the law a recent decision of the Supreme Court of the United States, in which the question is adequately considered, is particularly valuable. *Sigafus v. Porter*, 21 Sup. Ct. Rep. 34. In an action for deceit the circuit judge instructed the jury that "the measure of damages is the difference between the value of the property as it proved to be and as it would have been as represented." The Supreme Court adopted the rule of *Smith v. Bolles*, *supra*, and held this to be a reversible error. Justices Brown and Peckham dissented.

Aside from the numerical weight of authority it is difficult to see any justification for the decisions *contra* to that of the principal case. In an action for a tort such damages are recoverable as are the natural and probable consequences of the tortious act. Where a party is induced to purchase property by another's fraudulent misstatements the vendor's wrongful act is not that the representations he made were false, but that he made false representations. Because of these fraudulent misrepresentations the plaintiff parts with a certain amount of money and receives in return certain property. Consequently the damages awarded should

be the amount the plaintiff is out of pocket by having this property instead of his money, together with the loss of interest and the expenses directly attributable to the defendant's fraud. Where the suit is for a breach of warranty the measure of damages must of necessity be entirely different, for then the defendant is liable on a contract, and if it is broken he must make good what the plaintiff loses by its not being fulfilled. That in the same transaction the defendant has made a fraudulent misrepresentation as well as a contract by no means necessitates the damages in the tort action being the same as those for the breach of contract. The two rights of action are entirely separate, and the rule of damages appropriate to tort actions must apply in a suit for the tort, though the very statement that constitutes a warranty may, and perhaps generally does, furnish a cause of action for deceit. The presence of these alternative remedies was probably the cause of the erroneous rule of damages that so largely prevails in this country.

RIGHTS UNDER A THEATRE TICKET. — An interesting question as to the nature of a ticket for a reserved seat in a theatre is suggested by a recent decision, where the plaintiff, a colored man, was allowed to recover in tort for being ejected from his seat in the theatre during the performance. *Ferguson v. Chase*, Washington Law Reporter, Nov. 22, 1900. The court rely on the doctrine of *Drew v. Peer*, 93 Pa. St. 234, where there is a strong *dictum* to the effect that holders of particular seats have more than a mere license, their right being "in the nature of a lease, and entitling them, therefore, to peaceable ingress and egress, and exclusive possession of the designated seats during the performance." The weight of authority, it seems, is contrary to this view. Most of the few cases on the subject treat a ticket as a mere license. Wandell's Law of the Theatre, 221. Accordingly when the purchaser of a ticket was expelled from the grand stand of a race-track an action of assault and battery was refused on the ground that the license was revocable, and that upon its revocation the purchaser became a mere trespasser who could rightfully be removed from the premises. *Wood v. Leadbitter*, 13 M. & W. 838. In Massachusetts this English decision has been followed, and a theatre manager has been held justified in refusing to allow the holder of a ticket to take his seat in the theatre. *Burton v. Scherpf*, 1 Allen, 133; *McCrea v. Marsh*, 12 Gray, 211. In the latter case it is said that the right conferred by a theatre ticket is a contract implied from the sale and delivery of the ticket, which gives the holder a license to enter the theatre and watch the performance. Under this doctrine the proprietor may exclude any spectator at any time, and be answerable only on the contract for whatever legal damages his breach has caused. It may be noted that in the English and Massachusetts decisions it does not appear that the ticket called for any particular seat, as in the principal case. Of course such being the fact it would be impossible to construe the ticket as a lease. Where, however, the ticket does call for a particular seat, exclusive possession for a specified time is given, and there is a sufficient memorandum of the agreement; thus it may be argued that no essential element of a lease is lacking. The answer seems to rest in the fact that in the sale of a ticket no lease is intended. It is often expressly stated on such tickets that "the management reserve the right to revoke this license on refunding

its face value." A strong analogy may be drawn from the case of a lodger under an oral contract for board and lodgings in a private boarding-house. The keeper of the house reserves the legal possession, custody, and care of the whole house in which the lodger is but a licensee, his contract not being regarded as a lease of realty. *White v. Maynard*, 111 Mass. 250; *Wilson v. Martin*, 1 Den. (N. Y.) 602. Nor is the management of a theatre under a duty to the public to give a performance, for, although the state exacts a license for the privilege of giving theatrical exhibitions, this in no way changes the character of the theatre from a private to a public undertaking. Accordingly admission cannot be demanded as of right. *Purcell v. Daly*, 19 Abb. N. C. 301 (N. Y.).

It seems, therefore, both on principle and authority, that a theatre ticket can, in no way, be regarded as more than a revocable license, and although it may be repugnant to the average theatre-goer's conception of his right, it is probably law to-day that he may be required to leave the theatre at any time without being able to hold the proprietor responsible in an action of tort.

GRANTEE'S ASSENT TO THE DELIVERY OF A DEED. — The much disputed question of the validity of a deed, made without the grantee's knowledge or assent, arose in a recent case. The owner of certain property deeded it to the plaintiff, in payment of a debt, and sent the deed to the recorder's office to be registered. Between the time of the delivery to the recorder and the delivery to the plaintiff, who had previously no knowledge of the deed, the defendant attached the land. The court held that, as a deed requires the grantee's actual assent, the attachment was levied before the deed took effect. *Knox v. Clark*, 62 Pac. Rep. 334 (Col.). In America, while many courts agree with the principal case, an equal number hold that assent will be presumed at least where the deed is beneficial, unless dissent is shown. *Welch v. Sackett*, 12 Wis. 243; *Mitchell v. Ryan*, 3 Ohio St. 377.

In early English law it seems that a deed passed title without assent on the grantee's part, just as now an heir or a remainderman necessarily takes title without assent. *Butler and Baker's Case*, 3 Co. 26 b. The transaction was regarded as unilateral, and it is probable that a dissenting grantee had to divest himself of title by deed. As it was felt desirable, however, that a gift, which might involve liabilities, should not be forced on a man against his will, so that he might not only be put to the trouble of deeding it away, but could be held responsible for any liabilities which might accrue by reason of its possession, a right of disclaimer was recognized. The grantee was permitted, on hearing of the deed, to dissent to the gift, whereupon not only his title, but likewise any liabilities which might have accrued to him in the mean time, were at once divested. Although some of the later English cases, not carefully distinguishing between actual dissent, the exercise of the right to disclaim, and a lack of assent, where the right to disclaim still exists, have stated in loose terms that assent is necessary, but that it will be presumed where no actual dissent is shown, yet the doctrine of disclaimer is generally considered in England as the basis of the law. *Siggins v. Evans*, 5 E. & B. 367.

The American courts, in recognizing the inadvisability of forcing property on an unwilling grantee, have unfortunately adopted the erroneous

view, suggested by some of the English cases, that assent is necessary. In other words, they have regarded the transaction as bilateral or contractual. Many have required an actual assent, but others, seeing that justice would be furthered by sustaining grants to insane persons, and to those under a legal disability, — by whom actual assent is impossible, — and such grants as that in the principal case, have recognized the fiction of presumed assent in all cases where no dissent is shown. In so doing they seem to have reached a more desirable result, although at the expense of an objectionable legal fiction, than those courts which insist on actual assent. Yet in one class of cases, if they carried out their doctrine logically, great injustice would result. Where property is granted in trust, and the trustee refuses to accept the trust, they would be compelled to hold that dissent being shown, no assent can be presumed, and that, therefore, as the legal title cannot be held to have ever vested, the trust is void. Considering, then, that to hold actual assent necessary results in injustice, and that to presume assent results in fictions and logical inconsistency, it would seem well to accept the English doctrine, already recognized by the Supreme Court of the United States in the case of trusts, that a conveyance passes title without the grantee's assent, but that the latter may disclaim, and thereby divest himself both of the legal title and of any liabilities which may have accrued to him through its possession. *Adams v. Adams*, 21 Wall. 185.

PROOF OF FUTURE RENT AGAINST A BANKRUPT LESSEE. — It seems to be settled law that, under any bankruptcy act which makes no special provision as to leases, rent to accrue after the bankruptcy of the tenant is not provable against his estate. Rent in its nature is earned only on the completion of a certain period of occupation. Rent to accrue in the future is therefore no present debt; and since it may never become due, it was not considered such a liability as might be proved even under the broad provisions as to contingent liabilities in the United States bankruptcy acts of 1841 and 1867. *Deane v. Caldwell*, 127 Mass. 242. So, too, under the present act it is held that future rent is not provable, not being a fixed liability absolutely owing at the time of the filing of the petition, nor yet such an unliquidated claim as may be liquidated and proved under sect. 63 b. *In re Mahler*, 3 N. B. N. Rep. 39 (Dist. Ct., Mich.).

While this is undoubtedly the settled rule, yet the refusal to allow the lessor to prove for any actual loss he has suffered may on occasion result unfairly to the lessee as well as to the lessor. The trustee, it is true, may assume the lease, in which case the rent becomes part of the costs of administration. But if he fails to take over the lease, it would seem to follow that, apart from an eviction or an accepted surrender, the bankrupt tenant remains personally liable for the accruing rent, as in the case of other non-provable claims. Such has been the general rule both in England before the more recent statutes, *Copeland v. Stephens*, 1 B. & Ald. 593, and in this country under all of our federal acts. *Lansing v. Prendergast*, 9 Johns. 127 [1812]; *Bosler v. Kuhn*, 8 Watts & S. 183 [1844]; *Ex parte Houghton*, 1 Low. 554 [1871]; *In re Ells*, 98 Fed. Rep. 967 [1900]. This result is unfortunate in that it may saddle the lessor with an unprofitable tenant, and it is opposed to the policy of the bankrupt laws in allowing this liability to continue against the bankrupt lessee.

Another view is that the bankruptcy proceedings immediately sever the relation of landlord and tenant. *In re Jefferson*, 93 Fed. Rep. 948 [1899]; *Bray v. Cobb*, 100 Fed. Rep. 270 [1900]. This is obviously to create a rule as to leases which does not apply to other property, and is to disregard the fact that a lease is a form of conveyance rather than a mere contract. Moreover, this view is scarcely less objectionable as a matter of convenience to the parties to the lease. It may be that the tenant is in such a situation that, out of his earnings or other after-acquired property, he can pay his rent. In such a case it seems unjust to force him out of the premises, and it may equally harm the landlord to deprive him of a profitable lease, with no chance to secure damages from the estate.

To obviate these difficulties the English bankruptcy acts of 1869 and 1883, and the Massachusetts insolvent law, which preceded the present federal act (Mass. Pub. Stats. c. 157, sect. 26), had special provisions with regard to leases. They free the bankrupt from all personal liability, but provide that when the trustee disclaims the lease the lessor may prove the damages caused by the surrender as a debt against the bankrupt lessee's estate. Such damages would in general be the difference between the value of the lease and the then market value of the premises. *Ex parte Blake*, 11 Ch. D. 572. These provisions are clearly in the right line, protecting the lessor from entire loss, and releasing the bankrupt from future liability. It might be well to allow the tenant, on the trustee's disclaiming, to continue the lease on proof of his ability to pay the rent, letting the lessor prove for the amount of his loss if the bankrupt as well as the trustee disclaims the lease. Such a provision would fully protect both parties, and would do away with the present unsatisfactory conditions. It is much to be regretted that the subject was not dealt with in the act of 1898.

INJUNCTIONS AGAINST CONTINUING NUISANCES.—The interesting question whether an injunction is granted as a matter of course in the case of a continuing nuisance, or whether it is within the discretion of the court to deny this relief, if the resulting benefit to the plaintiff would be slight compared with the loss to the public or the individual, was suggested in a recent case. *Riedeman v. The Mt. Morris Co.*, New York Law Journal, Dec. 18. The plaintiff, who owned a tenement house in a business section of the city of New York, prayed that the defendant might be enjoined from so operating his electric lighting plant as to injure the plaintiff's premises by vibration and soot. The court held that the evidence of a nuisance was not conclusive, and further that as an injunction would cause serious injury to the defendant and to the public at large, with but a relatively slight benefit to the plaintiff, the latter should be denied injunctive relief, and accordingly remitted him to his remedy at law. The first ground clearly justifies the decision. As to the second there is much dispute. In England an injunction seems to be granted as a matter of positive right in the case of a continuing nuisance. *Broadbent v. The Imperial Gas Co.*, 7 DeG. M. & G. 434, 462. A number of decisions in America are to the same effect. *Hennessy v. Carmoney*, 50 N. J. Eq. 616. But New York has denied the relief where the injury was nominal, *Gray v. Manhattan R. Co.*, 128 N. Y. 499, and there are a number of *dicta* and a few decisions which allow the court to refuse an

injunction where the complainant's damage is relatively small, even though it be substantial. *Doughty v. Warren*, 85 N. C. 136.

The equitable rule has long been recognized that an injunction will be granted to prevent irreparable injury or a multiplicity of actions. "Irreparable injury" is a term not clearly defined, but it seems that one who is continuously disturbed in the enjoyment of his property may be considered irreparably injured. The inconvenience of a multiplicity of actions could only be prevented by injunction, as nuisances of this character are seldom of so permanent a nature as to justify the granting of future damages by a court of law. It is sometimes stated that the granting of any injunction lies within the discretion of the court, yet such discretion, by the better view, ought to be employed only in considering whether a case is clearly within an equitable rule, and not in deciding whether a definite equitable rule ought to be applied to facts clearly within its scope.

In at least three classes of cases, however, the result of granting injunctive relief may seem undesirable. In the first class are nuisances caused by businesses, which, like that in the principal case, are vitally important to the public, and must be located in cities where they necessarily disturb adjacent owners. In the second are nuisances caused by the damming or pollution of rivers by mill-owners. In the third, nuisances caused to houses built around factories subsequent to their erection, which possibly could not have been foreseen. But if an exception in such cases were recognized to the general equitable doctrine, no practical rule could be framed to determine the cases within its scope. On the one hand disturbances caused by nuisances cannot be adequately measured in damages: and on the other hand each court would have its own view as to what constitutes a loss to the public. Again, the evils of allowing injunctions may be readily avoided in the first two classes of cases by legislative enactments permitting the nuisance on payment of compensation. In the third class legislation, though possible, is not so feasible. Yet as the factory owners had an opportunity to protect themselves against any possible trouble by building only where they could buy up the adjoining land before building, if they have failed in this, it is perhaps not a great injustice that they should suffer, even though the public to some extent must suffer with them. In view, then, of the definite equitable rules above stated, and the practical difficulties in overriding them, it seems best for the courts to allow an injunction whenever a legal right appears, and leave any changes necessary to legislation.

OUSTER FROM PARTICULAR FRANCHISES BY QUO WARRANTO PROCEEDINGS. — There has been some doubt whether, in *quo warranto* proceedings, a defendant can be ousted from particular franchises alleged to be incidental to, or a part of, a valid franchise or office. Some courts have held that if the defendant can show a valid title to one office or franchise, *quo warranto* is not the proper remedy to test his right to do certain acts alleged to be a part of the functions of that office or franchise. *People v. Whitcomb*, 55 Ill. 172. But the true rule seems to be that where the acts in question amount to a franchise distinct from the one lawfully exercised, the authority to perform those acts must be shown by the defendant when called upon by the sovereign. *People v. Ins. Co.*, 15 Johns.

358. Authority to enjoy a certain franchise cannot be a defence for doing acts not appertaining to that franchise, and, if those acts amount to a distinct franchise, the defendant cannot show authority to exercise the franchise he is called upon to defend. From the nature of the remedy, the sovereign is entitled to call upon the defendant to show *quo warranto* he exercises any franchise, and, if several are claimed, one or all may be attacked; the defendant being obliged to show authority to exercise any and all questioned. *People v. City of Oakland*, 92 Cal. 611 (Sup. Ct.); *State v. City of Topeka*, 30 Kan. 653; *People v. City of Peoria*, 166 Ill. 517. Obviously, the same rule must apply where the authority to perform the acts in question is unconstitutional. *People v. Saratoga, etc. R. R. Co.*, 15 Wend. 113. Moreover, the rule is well established that the existence of other remedies, whereby a person's right to a public office or franchise may be tested, does not supersede proceeding in *quo warranto* for the same purpose. 2 Spel. Ext. Rel. § 1776.

The question is involved in two recent cases, but in each is unfortunately overlooked by the court. *City of Newport v. Horton et al.*, 47 Atl. Rep. 312 (R. I.); *State v. Flemming*, 59 S. W. Rep. 118 (Mo.). In the first a statute had created a board of police commissioners for a certain city, with powers, *inter alia*, to appoint a chief, to control the police of the city, to occupy city buildings, and to be paid by the city. *Quo warranto* proceedings were brought against the commissioners and their appointee. Upon the principle of the above cases, the defendants were called upon to show by what authority they claimed their offices, and by what authority they claimed to exercise the three franchises included in the powers given, — namely, the power to take city property, apparently without compensation; the appropriation of city funds; and the right to supersede the local police. But the court held that the statute in question was constitutional, in so far as it related to the title to office of the chief appointed by the board, and that the constitutionality of other parts of the statute was not in issue. Obviously, however, the defendants were claiming franchises distinct from the one held to be valid, and authority to exercise those franchises was conferred upon the defendants only if the statute was constitutional in giving those particular franchises. The right to exercise the franchises was as much in issue as the right to hold the offices, and the defendants should have been ousted from those offices or those franchises for the exercise of which they could show no lawful authority. In the other case mentioned (*State v. Flemming, supra*), the court held that in *quo warranto* proceedings against duly elected officers of a city, the right of those officers to act in certain territory alleged not to be a part of the city could not be questioned. But the defendants could show authority to exercise franchises in a certain city only, and authority so to act was not authority to exercise the same or other franchises in another city. The extent of the city in which the defendants were duly elected officers was, therefore, in issue, and proof that the city extended over the territory in question was necessary to establish the defendants' right to exercise franchises and hold offices in that territory. Hence in both cases the defendants did not affirmatively establish their right to exercise the franchises claimed by them, and yet the court failed to oust them from those franchises.

RECENT CASES.

BANKRUPTCY — CONSTITUTIONAL LAW — INCRIMINATING QUESTIONS. — The Bankruptcy Act provides that no testimony given by the bankrupt on his examination shall be used against him in any criminal proceeding. *Held*, that this does not provide sufficient immunity from prosecution to take the case out of the Fifth Amendment. *In re Walsh*, 104 Fed. Rep. 518 (Dist. Ct., S. D.).

This holding is in accord with a number of recent decisions. *In re Scott*, 95 Fed. Rep. 816; *In re Rosser*, 96 Fed. Rep. 305. The opposite result has, however, been reached in one case, which seems inadequately considered. *Mackel v. Rochester*, 102 Fed. Rep. 314. It may be doubted, perhaps, if the Fifth Amendment was ever intended to give such extensive protection, but it is now perfectly settled that nothing short of absolute immunity from prosecution will take the place of the constitutional privilege. *Counselman v. Hitchcock*, 142 U. S. 547; *Brown v. Walker*, 161 U. S. 591. The clause of the Bankruptcy Act clearly does not meet this requirement, and hence the principal case is rightly decided. It is to be noted that in England, in the absence of constitutional protection, such questions can be asked, and the answers later used in criminal proceedings. *Regina v. Cross*, 7 Cox C. C. 226.

BANKRUPTCY — CONTINGENT CLAIMS — PROOF AGAINST GUARANTOR. — The bankrupts had guaranteed the payment of certain notes at maturity, which did not occur until after the filing of the petition in bankruptcy. *Held*, that the holder cannot prove against the bankrupt's estate, since his claim is not based upon a "fixed liability absolutely owing at the time of the filing of the petition," as required by section 63 a (1) of the Bankruptcy Act of 1898. *In the matter of McCauley & Sons*, 2 N. B. N. Rep. 1085. See NOTES, 14 HARV. LAW REV. 372.

BANKRUPTCY — INSURANCE — PAYMENT OF PREMIUMS. — A, having a policy of insurance on his life, while solvent voluntarily assigned it to trustees for his wife and children. Several years later he became insolvent, but continued to pay the premiums until his death. *Held*, that no part of the payments are conveyances or transfers of property. *In re Harrison*, [1900] 2 Q. B. 710.

The English courts have uniformly held that a voluntary transfer of a policy of life insurance, made while the debtor was insolvent, may be set aside. *Taylor v. Coenen*, 1 Ch. D. 636. Clearly it should make no difference whether the property is actually handed over by the debtor, or only paid for by him. In either case property which should be used for the payment of his debts has inured to the benefit of a volunteer. The true solution of the life insurance cases is to apply the rule followed where the insolvent husband voluntarily expends money in the permanent improvement of his wife's land. There a charge upon the land is created for the benefit of his creditors. *Humphrey v. Spencer*, 36 W. Va., 11, 18; *Seasongood v. Ware*, 104 Ala. 212; *Isham v. Schaffer*, 60 Barb. 317. So here money of the husband has been diverted from the payment of his debts to preserve the property of the wife. To the extent that this property has been thus benefited in fraud of the creditors it should be charged in their favor. The payments of premiums by the insolvent debtor are for all practical purposes gifts to the beneficiary. *Merchants', etc. Co. v. Borland*, 53 N. J. Eq. 282. The decision in *Central Bank v. Hume*, 128 U. S. 195, in accord with the principal case, is criticised in 25 AM. LAW REV. 185.

BANKRUPTCY — INVOLUNTARY BANKRUPTCY — COMPUTING NUMBER OF CREDITORS. — A general assignment for their benefit was assented to by all the creditors of the bankrupt save one, who filed a petition in involuntary bankruptcy. The Bankruptcy Act, 1898, § 59 b, allows one creditor to file a petition where all the creditors are not over twelve in number. *Held*, that the assenting creditors should be excluded in computing the number of creditors under this clause. *In re Miner*, 104 Fed. Rep. 520 (Dist. Ct., Mass.).

The Bankruptcy Act, § 1 (9), defines a creditor as one who has a provable claim against the bankrupt. While a creditor who assents to a general assignment is estopped to join in the petition, *In re Williams*, Fed. Cas. No. 17706, he may yet prove his

claim. *In re Troth*, 1 Fed. Rep. 405. Accordingly he seems to come squarely within the terms of the definition, and should be counted as a creditor under § 59 b. The reverse is true of a preferred creditor who is not allowed to prove his claim, *In re Currier*, Fed. Cas. 3492, and the decisions as to such creditors are not therefore in point. Nor is a general assignment in itself objectionable. *Mayer v. Hellman*, 91 U. S. 496. While it is made an act of bankruptcy, *West Co. v. Lea*, 174 U. S. 590, there seems to be no reason why it should not be resorted to where a sufficient number of creditors desire it. The present decision is opposed to the spirit of the Act, and to business convenience in compelling a large number of creditors to submit to one, or be at the expense of buying him off.

BILLS AND NOTES — COLLATERAL SECURITY — POWER OF SALE. — A promissory note was pledged as collateral to another note with power, on non-payment of the principal note, to sell without notice. The creditor for four years after the maturity of the principal note received payments on it, without realizing on the collateral, until only a small sum remained due. *Held*, that he had no right thereafter to sell the collateral without notice to the pledgor to redeem, and that the purchaser from him could not recover against the accommodation indorser of the collateral note. *Moses v. Grainger*, 58 S. W. Rep. 1067 (Tenn., Sup. Ct.).

The ordinary rule is that negotiable paper held as collateral security cannot be sold by the pledgee, but can only be collected at maturity. *Wheeler v. Newbould*, 16 N. Y. 392; *Joliet Iron Co. v. Scioto Brick Co.*, 82 Ill. 548. Stipulations, however, in the contract, allowing the pledgee to sell on default, with or without notice to the pledgor, are valid. *Nelson v. Eaton*, 26 N. Y. 410 (*semble*). It is difficult to see, then, why such a provision should have been declared ineffectual in the principal case, merely because the four years' indulgence had given the impression that the collateral would not be sold. Since at the time of the sale the collateral note must have been overdue, the purchaser would, of course, get only the rights which the pledgee had, that is, the right to enforce it against the accommodation indorser to the amount still due on the principal obligation. The amount realized by the sale would go in extinguishment of this obligation and the pledgor would not be injured in the least. The decision, therefore, nullifies the power of sale without any satisfactory reason.

CONFLICT OF LAWS — BILLS AND NOTES — GARNISHMENT. — The defendant, a resident of New York and the payee of a note executed in Vermont, transferred the note in New York, no notice of the transfer being given to the Vermont maker. *Held*, that the plaintiff, who was a resident of Vermont and a creditor of the defendant, could garnish the maker under a Vermont statute allowing the attachment of negotiable paper by trustee process as the property of the transferor at any time before notice of transfer is given to the maker. *Hawley v. Hurd*, 47 Atl. Rep. 401 (Vt.).

The doctrine that a debt can be garnished at the domicile of the debtor without having jurisdiction over the creditor is, though on principle unsound, supported by the weight of authority. *Chicago, etc. R. Co. v. Sturm*, 174 U. S. 710; 13 HARV. LAW REV. 596. The present case however is, it is believed, a misapplication of this doctrine. No notice of transfer being necessary by the law of New York, the transferee acquired an unimpeachable title to the note, which should be recognized everywhere, since, on the question of title, the law of the place of transfer, rather than the law of the place where the note is made, should govern. *Alcock v. Smith*, [1892] 1 Ch. 238; *Clark v. Connecticut Peat Co.*, 35 Conn. 303. The present case, therefore, not only allows the garnishment of a debt without having control of the creditor, but allows it in a case where the defendant had ceased to be the owner of the debt according to the principles of conflict of laws. For the contrary and better view, see *Clark v. Connecticut Peat Co.*, *supra*.

CONSTITUTIONAL LAW — POLICE POWER — PHARMACY ACT. — A statute in Illinois made it unlawful for any person not a registered pharmacist to compound or sell any drugs or medicines. *Held*, that in so far as this act imposes a restriction upon the sale of patent or proprietary medicines it is unconstitutional and void. *Noel v. The People*, 58 N. E. Rep. 616 (Ill.). See NOTES, 14 HARV. LAW REV. 382.

CONTRACTS — ASSUMPTION OF MORTGAGE DEBT — RIGHT OF MORTGAGEE TO SUE. — A executed a mortgage to B, the plaintiff, upon certain land which he later conveyed to C, who did not assume payment of the mortgage debt. C conveyed the land to D, the defendant, who assumed payment. *Held*, that B can recover the mortgage debt from D. *Cobb v. Fishel*, 62 Pac. Rep. 625 (Colo., C. A.).

Held, that B cannot recover the mortgage debt from D. *Eakum v. Shultz*, 47 Atl. Rep. 274 (N. J., Ch.).

In each of these jurisdictions, the general rule prevails that the mortgagee can recover when the intervening parties have assumed payment. *Starbird v. Cranston*, 24 Colo. 20; *Klapworth v. Dressler*, 13 N. J. Eq. 62. There are, however, two distinct theories on which this rule is based. One rests upon an equitable doctrine that the grantee's promise is an asset of his grantor which could be reached by the mortgagee, the grantor's creditor, through trustee process. *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650. According to this theory, the principal case in New Jersey is correctly decided, since C, the defendant's grantor, owed nothing to the plaintiff. The other decisions rest upon the general doctrine that the beneficiary may sue. *Starbird v. Cranston*, *supra*; *Lawrence v. Fox*, 20 N. Y. 268. In New York, however, where this doctrine arose, the courts have not allowed the mortgagee, situated as in the principal case, to recover. *Vrooman v. Turner*, 69 N. Y. 280. Moreover, the practice of allowing beneficiaries to sue is unsound on common law principles. *Price v. Easton*, 4 B. & Ad. 433. The equitable doctrine in these cases is therefore clearly correct.

CONTRACTS — CONSTRUCTION — INDEFINITENESS OF PRICE. — A agreed in writing to furnish B news for publication during a period of one year, and B agreed to accept the news and pay for it a sum not exceeding three hundred dollars per week. After part performance of the contract, B refused to go on. *Held*, that the terms as to the price are so indefinite that no substantial damages can be recovered for the refusal to receive the news. *United Press v. New York Press Co.*, 164 N. Y. 406; 58 N. E. Rep. 527.

It is generally held that where a contract of sale is within the Statute of Frauds a clear statement of the price is an essential in the written memorandum: *Elmore v. Kingscote*, 5 B. & C. 583; *Stone v. Browning*, 68 N. Y. 598. The Statute of Frauds appears to have no application to the principal case, however, on account of the acceptance and receipt by the defendant of part of the subject matter. N. Y. REV. ST. 1343. Accordingly the inevitable result of the decision is that wherever an executory contract is silent as to the price to be paid the plaintiff during its term, it possesses no binding force. This is a harsh conclusion, and the fairer way is to construe such a contract as an agreement to pay what the goods or services are worth. *Woodly v. McLaine*, 10 Bing. 482. Moreover, by a fair interpretation of the writing, it was agreed to pay the regular price for the news, up to \$300 per week, and this gives a clear basis for computing the price, so that in no reasonable sense can the price be called indefinite.

CONTRACTS — DAMAGES — DEFECTIVE CONSTRUCTION. — The defendant, in building a bridge for the plaintiff under a written contract, constructed one of the piers less securely than was called for by the specifications. The plaintiff in ignorance of this defect paid the contract price. The bridge and pier were afterward destroyed by a freshet of such violence that it would have destroyed them if the pier had been constructed according to the contract. *Held*, that the plaintiff may recover the cost of rebuilding the pier according to the specifications. *Sullivan County v. Ruth*, 59 S. W. Rep. 138 (Tenn., Sup. Ct.).

If the bridge and pier had remained uninjured, the damages would have been the difference between the value of the bridge as it was and as it should have been built. *Kidd v. McCormick*, 83 N. Y. 391. And if, as was apparently the case, the pier was so unsafe that it must necessarily have been rebuilt, the difference would have been the cost of rebuilding the pier. The intervention of the freshet could not increase the damages, since the defendant's breach of contract was not the cause of the destruction of the bridge. Nor could the destruction of the pier diminish the damages, which must be estimated with reference to the time when performance was due. *Brown v. Muller*, L. R. 7 Ex. 319. In questions of consequential damages, such as loss of prospective profits, events subsequent to the time for full performance may of course affect the damages. *White v. Miller*, 71 N. Y. 118, 133, 134. But where only direct damages are in question such subsequent events cannot alter the amount of an obligation which is already vested and determined. The decision is therefore entirely sound.

CONTRACTS — FRAUDULENT REPRESENTATIONS — NEGLIGENCE. — The defendant signed a written contract for the purchase of certain goods from the plaintiff, relying upon the fraudulent misrepresentations of the plaintiff's agent as to its con-

tents. *Held*, that his negligence in failing to read the contract barred his defence of fraud. *Dowagiac Mfg. Co. v. Schroeder*, 84 N. W. Rep. 14 (Wis.).

It is undoubtedly true as a general proposition of law that one who signs a contract is not allowed to set up his ignorance of its contents. *Dawson v. Burns*, 73 Ala. 111. But this rule should not hold where fraudulent representations as to its contents have been made, and the action is between the original parties. *Taylor v. Atchison*, 54 Ill. 196, 200. In such a case the question of negligence is immaterial, for the fraudulent party cannot set it up. *Albany, etc. Institution v. Burdick*, 87 N. Y. 40, 49; *BIGELOW, FR. p. 524*. The result in the principal case appears to have been due to a confusion with cases of promissory notes, where if the plaintiff is an innocent purchaser for value, and the defendant negligent, the fraud of the original payee is no defence. *Chapman v. Rose*, 56 N. Y. 137. The rule in such cases is due to the peculiar character of negotiable paper, and the position of the plaintiff, as a holder in due course, — facts which are entirely absent in the principal case. *Citizens' Nat. Bank v. Smith*, 55 N. H. 592.

CONTRACTS — NON-PERFORMANCE — EXCUSE. — *Held*, that a failure to ship goods within a reasonable time, as demanded by the terms of a contract, is not excused by the inability of the shipper to procure transportation owing to adverse discrimination against him. *Eppens, etc. Co. v. Littlejohn*, 164 N. Y. 187; 58 N. E. Rep. 19.

It is difficult to decide just what excuses of this nature are to be accepted, but the ruling of this case seems quite correct. Unavoidable delay caused by strikes has been held no excuse. *Castlegate Steamship Co. v. Dempsey*, [1892] 1 Q. B. 54. It is probably safest to limit the excuse of impossibility of performance to the three well-established classes — where it is caused by law, as in the case of the passage of a statute which prevents completion of the contract, *Buily v. De Crespigny*, L. R. 48 Q. B. 180; where goods have been destroyed, on which labor was to be performed, *Butterfield v. Byron*, 153 Mass. 517; and where sickness or death of the contracting party interferes, *Spalding v. Rosa*, 71 N. Y. 40. Beyond these limits, however, the courts properly hesitate to go, and as the loss must fall upon one of two innocent parties, it seems not unfair that there should be a strict application of the terms of the contract.

CORPORATIONS — INSOLVENT CORPORATION — DIRECTORS' LIABILITY FOR MINGLING MONEY. — A bank director, knowing that the bank was hopelessly insolvent, allowed deposits to be received and set apart. Later, without his fault, the cashier mingled these deposits with the funds of the bank. *Held*, that the director is personally liable to the depositors for losses so occasioned. *Cassidy v. Uhlmann*, 54 N. Y. App. Div. 205.

For a bank to receive deposits, with knowledge that it is insolvent, is universally held to be fraudulent. *St. Louis, etc. Ry. Co. v. Johnston*, 133 U. S. 566. Directors, who take part in such a transaction, are of course equally fraudulent, and should be held personally liable to the depositors, even though they direct that the deposits be kept separate. By this means it is true actual loss can be avoided, but since the depositor would not consent to such a proceeding if he knew the facts, the director has no right to impose the risk of its success on any one but himself. Sound public policy seems to require that directors be held to a strict accountability in such cases. The principal case is therefore to be commended, and is in accord with authority. *Miller v. Howard*, 95 Tenn. 407; *Delano v. Case*, 121 Ill. 247.

EVIDENCE — ADMISSIONS — DECLARATIONS BY MORTGAGEE. — *Held*, that the declarations of a mortgagee made prior to an assignment of the mortgage are not admissible against the assignee. *Merkle v. Beidleman*, 165 N. Y. 21; 58 N. E. 257.

Declarations of a former owner regarding his title to land are admissible against his assignee. *Woolway v. Rowe*, 1 A. & E. 114; *Pickering v. Reynolds*, 119 Mass. 111. This rule is based upon privity, or identity of interest, but such grounds seem unsound, since admissions are in their nature so purely in *personam* that their use should properly be restricted to suits concerning the maker or his personal representative. *Spargo v. Brown*, 9 B. & C. 935. In the case of personal property, the same broad rule formerly held, *Pacock v. Billing*, 9 Moore, 499, has been limited in later cases to the strict bounds suggested above. *Barough v. White*, 4 B. & C. 325; *Paige v. Cagwin*, 7 Hill, 361. There is no valid distinction between the two classes of cases, but since such admissions are at best dangerous and inconclusive evidence, the narrow rule is preferable. On principle, it would be expected that admissions by a mortgagee would be governed by the rule applied to realty, and the present case illustrates the extreme reluctance of the court to extend that rule beyond decided cases.

EVIDENCE — DYING DECLARATIONS — ABORTION. — *Held*, that, on an indictment for attempted abortion causing the death of the woman, her dying declarations are admissible in evidence. *State v. Meyer*, 47 Atl. Rep. 487 (N. J., C. A.).

The general rule is that dying declarations are admissible only in cases of homicide where the death of the declarant is the subject of the charge. *King v. Mead*, 2 B. & C. 605; *Regina v. Hind*, 8 Cox C. C. 300. Here the indictment was not for homicide, but for a statutory offence. Accordingly, under circumstances similar to those of the principal case, such evidence has been excluded. *People v. Davis*, 56 N. Y. 95. This decision, however, may have gone on the ground that, as proving the death of the child would have satisfied the indictment, the death of the mother was not necessarily in question. Moreover, there is authority for the contrary view. *Montgomery v. State*, 80 Ind. 338. In another case the evidence was excluded, but it is not clear whether the death was the subject of investigation. *State v. Harper*, 35 Ohio St. 78. By the strict doctrine this exception to the hearsay rule is given definite limits, but the reasons for the exception, — the desirability of securing conviction, and the special difficulty, in many cases, of procuring evidence, — seem to apply strongly to cases of this sort. Accordingly the evidence is admitted by statute in Massachusetts and New York. MASS. PUB. ST., 1889, c. 207, § 9; N. Y. ST. AT LARGE, 1875, c. 352. The principal decision, therefore, though doubtful historically, seems justifiable on practical grounds.

EVIDENCE — HEARSAY — OPINION IN PUBLIC DOCUMENT. — *Held*, that a certificate, made under the Army Rules, stating that the respondent had been admitted to an army hospital suffering from a certain disease, was admissible in evidence as a public document to prove that the respondent had committed adultery. *Gleen v. Gleen*, 17 Times L. Rep. 62 (P. D.).

The document in the principal case, being a record made by a public officer, in the discharge of his duties, of a transaction occurring in the course of these duties, was undoubtedly admissible as a public document, if there was no other objection to the matter therein stated than that it was hearsay. *Evanston v. Gunn*, 99 U. S. 660; *Sturba v. Freccia*, 5 App. Cas. 623. It seems, however, that the statement as to the nature of the respondent's illness might well be regarded not as a statement of fact, but merely as a statement of the opinion of the medical examiner; and on this view the document was clearly inadmissible, since opinion cannot be proved by hearsay. *Wright v. Tatham*, 5 Cl. & F. 670; *Hine's Appeal*, 68 Conn. 551, 557. The mere fact that the opinion is stated in a document otherwise competent could make no difference, just as not everything said by a competent witness is admissible. See THAYER, CAS. ON EV. 2d ed. 440, n. 2.

INSURANCE — ADMIRALTY — GENERAL AVERAGE. — The plaintiff, owner of a ship and of the cargo thereon, insured the cargo against any general average loss due to perils of the sea. Such a loss having occurred to the ship, *held*, that the insurance company is liable on the policy, although since both ship and cargo belonged to one owner there could be no contribution in fact. *Montgomery v. Indemnify, etc. Insurance Co.*, 17 Times L. Rep. 59 (Q. B. D.).

The principal case presents the first English decision upon this point, although there are earlier *dicta* each way. *Oppenheim v. Fry*, 3 B. & S. 873, 884, *accord*; *The Brigella*, [1893] P. 189, *contra*. It is well settled in the United States that a general average loss depends upon the nature of the loss, and not upon the fact that there are other contributing interests such as freight and cargo. *Potter v. Ocean Insurance Co.*, 3 Sumn. 27, 39. Thus there may be a general average loss to a vessel in ballast. *Greely v. Tremont Insurance Co.*, 9 Cush. 415, 418. Everywhere, moreover, freight and ship contribute separately, although both belong to one person. LOWND. AV. 4th ed. 3c8, 310. Where the insured owns both ship and cargo, he is, as owner of one, bound to contribute towards a general average loss to the other; and having the contribution in his own hands, his recovery from the underwriter of the property sacrificed is to this extent reduced. *Potter v. Providence, etc. Insurance Co.*, 4 Mason, 298. As the owner under these circumstances is virtually compelled to contribute towards the loss, the principal case seems right in sustaining an insurance against such liability.

PERSONS — HUSBAND AND WIFE — ESTATES BY ENTIRETIES. — *Held*, that independently of modern legislation, estates by entireties, not being suited to the conditions in Nebraska, are no part of the common law of that State. *Kerner v. McDonald*, 84 N. W. Rep. 92 (Neb.).

It is held in several jurisdictions that estates by entireties, though not expressly referred to in any statute, are impliedly abolished by the modern married women's property acts. *Appeal of Robinson*, 88 Me. 17. But this operation of the statutes in question is usually restricted to property conveyed after the passage of the acts. *Thoruley v. Thoruley*, [1893] 2 Ch. 229. On the other hand many jurisdictions hold that estates by entireties remain unless expressly abolished. *In Re Appeal of Lewis*, 85 Mich. 340. But the relations of husband and wife to such an estate are usually held to be altered in greater or less degree. *Hiles v. Fisher*, 144 N. Y. 306. The opinion in the principal case, though professing to disregard the modern statutes, seems on analysis to rest on the change in the general attitude of the law toward the marriage relation, a change brought about in part directly by legislation and in part by the influence of this legislation on the minds of the courts. The reasoning is not therefore entirely satisfactory, but the result is unobjectionable.

PERSONS — RIGHT TO DOWER — ANTENUPTIAL CONVEYANCE. — A widower, before a second marriage and without the knowledge of his intended wife, conveyed a portion of his land to three sons by a former marriage. Held, that his second wife is entitled to dower in the land. *Ward v. Ward*, 57 N. E. Rep. 1095 (Ohio). See NOTES, p. 452.

PROPERTY — COVENANT AGAINST INCUMBRANCES — ESTOPPEL. — Defendant granted land by a deed, containing a covenant against incumbrances, but under circumstances giving him an equitable defence to actions on the covenant by his grantee. The latter conveyed to the plaintiff without notice of the equity. Held, that the defendant is estopped to set up his equity against the plaintiff in a suit on the covenant. *Randall v. Macbeth*, 84 N. W. Rep. 119 (Minn.).

Although by the general American rule the breach of a covenant against incumbrances must occur at once, leaving only a *chose in action*, yet, where a statute makes *chooses in action* assignable, the right of action is held to accompany the land, and the assignee is allowed to sue. *Hall v. Paine*, 14 Ohio St. 417. See 13 HARV. LAW REV. 608. The court bases the plaintiff's right to sue in the principal case on such a statute, but refuses to apply to these facts the settled rule that such an assignee takes subject to defences good against his assignor, *Way v. Colyer*, 54 Minn. 14, and holds that the covenantor must in justice be estopped to set up such defences against the plaintiff. The latter is thereby placed in the same position as the innocent holder of a promissory note. *Peacock v. Rhodes*, 2 Doug. 632. The desirable result of allowing the owner of the land for whose benefit the covenant is made to get the full advantage of it is thus reached, but the case is indefensible on principle.

PROPERTY — DEEDS — DELIVERY. — X deeded property to his wife to whom he was indebted and sent the deed by his attorney to be recorded. It was properly recorded and returned to the attorney, and thereupon it was given to the grantee, who had no previous knowledge of the transaction. Meantime the defendant had attached the land. Held, that there was no valid delivery until the grantee received the deed, and that therefore the defendant's attachment was good against her. *Knox v. Clark*, 62 Pac. Rep. 334 (Colo.). See NOTES, p. 456.

PROPERTY — EASEMENTS — IMPLIED GRANT. — Two adjoining lots of land, whose boundary bisected a dwelling-house, were simultaneously conveyed by the common owner, the one lot to the plaintiff and the other to the defendant's grantor. Held, that the plaintiff has no implied easement in that part of the house on the defendant's lot. *Whyte v. The Builders' League of New York*, 164 N. Y. 429; 58 N. E. 517.

In the conveyance of part of a lot of land, it is generally held that there is an implied grant of all reasonably necessary, continuous, and apparent quasi-easements over the land retained by the grantor. *Lampman v. Milks*, 21 N. Y. 505. See 14 HARV. LAW REV. 232. Where there are simultaneous conveyances of two adjoining lots by one grantor to two separate grantees, the same rule is applied as to the rights of each grantee over the land of the other. *Larsen v. Peterson*, 53 N. J. Eq. 88; *Cannon v. Boyd*, 73 Pa. St. 179. Such a transaction amounts to a voluntary partition, each party being virtually both grantor and grantee, and the argument that an easement is a derogation from the grant is therefore inapplicable. In the principal case, the mutual rights of user of the adjoining halves of the house seem clearly to be such apparent and continuous quasi-easements as should pass under the general rule. The result is therefore unfortunate, and contrary to the weight of authority.

QUASI-CONTRACTS — MISTAKE OF LAW — RECOVERY OF MONEY. — *Held*, that the plaintiff can recover premiums paid on a void insurance policy although the money was paid under a mistake of law. *Metropolitan Life Ins. Co. v. Blesch*, 58 S. W. Rep. 436 (Ky.).

The earlier decisions do not distinguish between mistakes of law and mistakes of fact in such cases, and in some recovery was allowed where the mistake seems to have been one of law. *Bonnell v. Fouke*, 2 Sid. 4; *Jaques v. Golightly*, 2 W. Bl. 1073. The modern rule is intimated for the first time in the remark by Buller, J., "If the law was mistaken, the rule applies, that *ignorantia juris non excusat*." *Lowry v. Bourdieu*, 2 Doug. 467 (1780). This remained unnoticed until adopted by Lord Ellenborough in 1802. *Bilbie v. Lumley*, 2 East, 469. In spite of the protest by Chambre, J., *Brisbane v. Dacres*, 5 Taunt. 143 (1813), the rule has been generally adopted that money paid under a mistake of law cannot be recovered. KEENER, QUASI-CONTRACTS, 85. The modern rule is unsupported by principle, for the maxim applied by Buller, J., is of value only where a defendant tries to excuse a wrong, and cannot be interpreted that every one must know the law. *Queen v. Mayor of Tewkesbury*, L. R. 3 Q. B. 629. In view of the origin of the modern rule and the hardship frequently caused by it, a return to common law principles, as in the present case, seems not entirely unjustifiable.

QUASI-CONTRACTS — STATUTE OF FRAUDS — EVIDENCE. — *Held*, that an oral agreement for services not to be performed within one year, though unenforceable on account of the Statute of Frauds, nevertheless fixes the value of services rendered under it by the plaintiff, when he is discharged after part performance without fault on his part. *Spinney v. Hill*, 84 N. W. Rep. 116 (Minn.).

It is well settled that where the defendant refuses to carry out an express oral contract coming within the Statute of Frauds, the plaintiff is entitled to recover in quasi-contract for the value of services rendered. *Wonsettler v. Lee*, 40 Kan. 367. Whether in such an action the express contract shall be admitted in evidence on the question of the actual value of the services, is a point on which there is a conflict of authority. Some courts consider it a violation of the statute to allow the amount of recovery to be influenced in any way by the express contract. *Fuller v. Reed*, 38 Cal. 99; *McElroy v. Ludlum*, 32 N. J. Eq. 828 (*semble*). But the contrary view, that the terms of the express contract are evidence on the question of value as admissions of the defendant, is, on principle, preferable. *Ham v. Goodrich*, 37 N. H. 185. There is, however, no authority or principle in support of the doctrine of the present case that the plaintiff has a right to recover at the rate fixed by the oral agreement.

QUO WARRANTO — MUNICIPAL CORPORATIONS — ILLEGAL ORDINANCE — PARTIES. — *Held*, that in *quo warranto* proceedings to prevent the exercise of municipal powers in territory included within city limits by an alleged illegal ordinance, the city itself, and not its officers, must be made defendants. *State v. Fleming*, 59 S. W. Rep. 118 (Mo.).

QUO WARRANTO — POLICE COMMISSIONERS — QUESTIONS RAISED ON QUO WARRANTO. — A statute created a board of police commissioners for a certain city, with powers, *inter alia*, to appoint a chief and control the city police, the expenses of the board to be paid by the city. In proceedings in the nature of *quo warranto*, brought against the commissioners and their appointee, *held*, that the only question raised is the constitutionality of the board's action in appointing a chief. *City of Newport v. Horton et al.*, 47 Atl. Rep. 312 (R. I.). See NOTES, p. 459.

RES JUDICATA — CRIMINAL AND CIVIL SUITS. — A statute authorized the court, in case of a conviction for maintaining a public nuisance, to issue a warrant for its abatement. *Held*, that an acquittal on such an indictment bars a subsequent action by the state to enjoin the continuance of the nuisance. *State ex rel. Remley, Atty-Gen. v. Meek*, 84 N. W. Rep. 3 (Iowa).

The ordinary principles of *res judicata* do not apply here, for in the criminal suit proof beyond a reasonable doubt is required, while in the suit in equity it is enough if the proof is satisfactory to the court. *Upjohn v. Richland Township*, 46 Vt. 542. This difference is sufficient to prevent one suit from being conclusive in the other. *Riker v. Hooper*, 35 Vt. 461; *Martin v. Blattner*, 68 Ia. 286. The court, however, considers the case analogous to those where it is held that an action *in rem* for a forfeiture under the internal revenue laws is barred by a previous acquittal on an indictment. *Coffey v. U. S.*, 116 U. S. 436. This seems incorrect. Those cases depend on

the policy of the statute in question, and are expressly decided on the ground that the forfeiture is part of the penalty imposed for a crime. An injunction, on the other hand, is an ordinary civil remedy, and recourse to it ought not to be affected by the fact that, for the sake of convenience, it is sometimes allowed as the result of a criminal suit.

SALES — UNSPECIFIED GOODS — EQUITABLE LIEN. — X induced the plaintiffs, commission merchants in New York, to accept his drafts on the faith of his promise to consign them a certain quantity of goods which he intended shipping to New York. Apparently no particular goods were then appropriated. The intended shipments were subsequently made, but consigned to the defendant, who had notice of the previous agreement, and who sold the goods for less than the amount of the plaintiff's advances. *Held*, that the agreement between X and the plaintiffs will be enforced in equity by allowing the plaintiffs an equitable lien on the goods shipped, and that they can therefore recover the proceeds. *Triest v. Noval*, 32 N. Y. Misc. Rep. 386 (Sup. Ct., Spec. Term).

It is held in most jurisdictions that a mortgage of after-acquired property is good in equity against a subsequent attaching creditor or assignee in bankruptcy, or against a purchaser with notice. *Hobroyd v. Marshall*, 10 H. L. Cas. 191; *Mitchell v. Winslow*, 2 Story, 630; *Wright v. Bircher*, 72 Mo. 179; *contra*, *Moody v. Wright*, 13 Met. 17. And though in most of the cases there was a formal mortgage deed, the principle obviously applies wherever there is an intention to create by contract a lien or charge on the property to be acquired for the purpose of securing a debt. *Brown v. Bate-man*, L. R. 2 C. P. 272; *Mitchell v. Winslow*, *supra*, 644. In the principal case the same rule is extended to property which was apparently already acquired but not yet specified. Provided the subsequent specification clearly identifies the property as that originally intended, there seems no good reason for distinguishing such a case from those above cited. The decision is therefore a step in the right direction.

STATUTE OF LIMITATIONS — CERTIFICATE OF DEPOSIT — DEMAND. — The plaintiff deposited \$500 with the defendant firm, and received a certificate of deposit, payable on return of the certificate properly indorsed. Nine years later the plaintiff demanded payment, and the defendant set up the Statute of Limitations. *Held*, that the statute did not begin to run until the demand. *Tobin v. McKinney*, 84 N. W. Rep. 228 (S. D.).

A certificate of deposit contains the elements of a promissory note and is ordinarily treated as such. *Bank of Orleans v. Merrill*, 2 Hill, 295; *Miller v. Austen*, 13 How. 218. Consequently courts have frequently held that a certificate, payable on its return, is like a demand note, due at its date, and that the statute therefore begins to run at once. *Brummagin v. Tullant*, 29 Cal. 503; *Mitchell v. Wilkins*, 37 Minn. 335. The established rule as to demand notes is, however, manifestly opposed to the terms of the instrument, and is indefensible on principle. *Cf. Downes v. Phoenix Bank*, 6 Hill, 297. Its evil results, moreover, as applied to bank notes have led to an exception in such cases. *Thurston v. Wolfborough Bank*, 18 N. H. 391. Business convenience and the clear intention of the parties no less require an exception in the case of certificates of deposit, and the weight of authority takes this position. *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377; *Munger v. Albany City National Bank*, 85 N. Y. 580. The principal case, therefore, though contrary to the general rule that negotiable paper, payable on demand, is payable without demand, takes the better view.

SURETYSHIP — CONTRACTS — DAMAGES. — When a promissory note was made, the payee contracted to return it to the maker on the happening of a certain contingency. This he was unable to do, as he had in the mean time transferred the note to a purchaser for value without notice. *Held*, that the maker can recover, in damages from the payee, the collectible value of the note. *Lyle v. McCormick, etc. Co.*, 84 N. W. Rep. 18 (Wis.).

Since the payee in this case will ultimately be liable to the maker, the latter is practically in the position of a surety. The general rule is that a surety has no cause of action against his principal, until he himself has paid the claim. *Gibbs v. Menard*, 6 Paige, 258. But this does not apply here, since the suit by the maker is for the breach of the payee's express contract to return the note. The only question, therefore, is as to the measure of damages. The great weight of authority holds in such cases that the plaintiff may recover the amount of the claim to which the defendant has exposed him. *Wicker v. Hoppock*, 6 Wall. 94; *Furnas v. Durgin*, 119

Mass. 500. The principal case points out that where the plaintiff is not responsible the more exact statement of the measure of damages is the collectible value of the claim. The result of the principal case is therefore correct, but a bill in equity to compel the defendant to indemnify the plaintiff against the debt would have reached the desirable result in a more satisfactory manner. *Wolmerhausen v. Gullick*, [1893] 2 Ch. 514.

SURETYSHIP—SUCCESSIVE TERMS OF OFFICE—LIABILITY OF SURETIES FOR SECOND TERM.—A school treasurer for two successive terms executed a new bond, with new sureties, for each term. In an action against the sureties on the second bond, for a defalcation appearing at the end of the second term, *held*, that *prima facie*, in case of such default, the sureties for the last bond are liable, and the burden is on them to show that the defalcation occurred during a prior term. *Board of Education v. Robinson*, 84 N. W. Rep. 105 (Minn.).

In accord with the principal case are several cases in which it is said that it will be presumed that the default did not occur in a former term. *Kelly v. State*, 25 Ohio St. 567; *Kagay v. Trustees*, 68 Ill. 75. There seems to be no reason for such a presumption, and it is not always made, for where there were no sureties for the second term a presumption has been made that the defalcation occurred during the first term, *Trustees v. Smith*, 88 Ill. 181. Again, in the absence of proof as to when the default took place, several groups of sureties have been held equally liable. *Phippsburg v. Dickinson*, 78 Me. 457. Clearly these cases cannot be supported on any theory of presumptions. The surety on a bond, however, is always liable unless he can show that the condition on which it was to be void has been performed. *Machiasport v. Small*, 77 Me. 109. In all these cases, therefore, the defendants were properly held, since they failed to show the absence of default during their respective terms.

TORTS—DECEIT—DAMAGES.—*Held*, that the measure of damages in an action for deceit is the difference between the real value of the property at the date of the sale and the price paid, with interest, together with remuneration for such outlays as may legitimately be attributed to the defendant's conduct. *Sigapes v. Porter*, 21 Sup. Ct. Rep. 34. See NOTES, p. 454.

TRUSTS—CHARITABLE BEQUEST—CY-PRES DOCTRINE.—The testator bequeathed money to his son for life, and in default of issue to a charitable institution. After the testator's death, and before the son's death without issue, the institution ceased to exist. *Held*, that the doctrine of *cy-pra* applies. *In re Solay*, 17 Times L. R. 118 (Ch. D.). See NOTES, p. 453.

REVIEWS.

BEVERLEY TOWN DOCUMENTS. Edited for the Selden Society by Arthur F. Leach. London: Bernard Quaritch. 1900. pp. lxii, 148.

This volume differs from the other publications of the Selden Society in that it contains few documents relating to legal history. The town records of Beverley are not of much importance for the study of legal procedure, because Beverley was a seignorial borough, and its lord, the Archbishop of York, had control of the municipal judiciary. The men of Beverley had a gild merchant and an elected body of twelve "Keepers," but not the right to hold their pleas in their own court or to elect their own bailiffs. The Keepers decided cases by arbitration, but the cognizance of pleas legally belonged to the court of the archbishop; and therefore we find no valuable plea rolls in the town archives. The Beverley Documents will, however, be cordially welcomed by students of economic and municipal history, for these muniments illustrate the development of borough government and the relations between the trade gilds and the

town in the fourteenth, fifteenth, and sixteenth centuries. There are many features of mediæval gild life that will remain obscure until more craft ordinances are published. One of these obscure points is the early status of the weavers and tanners, with which Mr. Leach deals, but on which he does not throw new light, though we are thankful for the early version of their laws printed in his Appendix.

Among the interesting problems that this volume will help to elucidate is the meaning of the term *communitas* in town records. It is clear that in Beverley, as in many other boroughs, the "community" was the town corporation, the aggregate of the "burgesses," and not, as Mrs. Green contends, a corporate body distinct from those who governed the town.

Mr. Leach's editorial work deserves high commendation, and his translations of the Latin documents are excellent. C. G.

A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES.

By John Lewis. Second edition. Chicago: Callaghan & Co. 1900.
2 vols. pp. cclix, 1555.

The first edition of this work appeared in 1888 and at once found a ready acceptance, as a satisfactory treatise on the subject of eminent domain was then lacking. The hold that Mr. Lewis's book obtained on the legal profession was permanent, and though other books on the subject have since appeared it has done much to shape the law of eminent domain as it now stands. But the amount of litigation on this subject of recent years has been very great, and while it has largely proceeded along the lines indicated in the former edition, many new points have been developed. These, together with an amplification of former material, have caused the addition of one hundred and ninety-two sections. This new matter is particularly noticeable in the chapters treating of "Roads and Streets," "What may be Taken," and "Compensation." The number of cases cited has also been more than doubled; the author's avowed object being to make the collection of authorities exhaustive. These citations are not restricted to cases decided in the United States, but over three hundred English and Canadian cases are included.

Perhaps the chief criticism that can be made of Mr. Lewis's valuable book might be that it is too comprehensive. The author has not restricted himself to his subject as closely as may be thought desirable. He discusses at considerable length many points in such topics as the law of waters, evidence, and damages, though their connection with his primary subject is not so close but that they are as fully, and more appropriately, treated in the text-books on these respective branches of the law. Further, the author has adopted the common method of quoting at great length from cases. This no doubt makes a so-called text-book easier of production, but at the same time lessens its value as an authority. In consequence of these two causes the book is larger than the nature of the subject would seem to warrant. A certain breadth of treatment also appears lacking in Mr. Lewis's discussion of grave constitutional questions. The absence of any consideration of these in the light of their historical development is noticeable. Consequently one does not feel entire confidence in his conclusions on some points. He adopts the prevalent opinion that the question of "public use" is for the judiciary, and with that as a premise concludes that the phrase "public

use" must mean "use by the public." For, he argues, it could not mean public benefit or utility, because the people would not commit such a question to the courts, but to the legislature. This conclusion necessitates his dissenting from certain cases which uphold the exercise of eminent domain for mills, mines, and drainage, and at the same time forces him to consider uses to which the power has never yet been extended — such as the establishment of hotels and theatres — to be proper subjects for its exercise. While it cannot be seriously questioned that Mr. Lewis's conception, that "public use" merely means "use by the public," has at no time been the accepted idea of the object of eminent domain, and cannot therefore be the sense in which the words were used in the constitutions, it further seems very probable that Mr. Lewis's premise is likewise defective. Before the adoption of our constitutions the question of the expediency and public nature of the object of the power was for the legislature, and it would seem that the constitutions have not altered the legislative authority in this respect further than to empower the court to hold invalid an arbitrary exercise of this right by the legislature. Thus the court has but the same power to supervise legislative action that it has over the action of the jury, and no one would say a question which the jury must pass upon is a question for the court. Mr. Lewis's statement that a man's property consists of a bundle of rights, and that it consequently is an exercise of the power of eminent domain when by any public improvement his property is made less beneficial to him, seems also open to question. It must be confessed that the weight of authority in this country since the former edition of Mr. Lewis's book has been apparently in his favor. On careful examination, however, that these cases consistently support the bundle of rights view is not so manifest, and as that is certainly not the common-law conception of property, it would seem better to accord with sound principles to hold with the earlier cases that an injury to property other than by a physical invasion is not an exercise of the right of eminent domain.

In the second volume the subject of proceedings in eminent domain has been treated at length, and very satisfactorily. In this part of the work the alterations have been less than in the first volume, yet even here the increase of matter is noticeable, especially in the footnotes. The entire work will be of great service to the practitioner, as it may safely be said to represent, and, in the main, correctly, the present stage of the law of eminent domain.

F. R. T.

A TREATISE ON THE LAW OF WATERS, including Riparian Rights, and Public and Private Rights in Waters, Tidal and Inland. Third edition. By John W. Gould. Chicago: Callaghan & Co. 1900. pp. cxvii, 956.

The value to the practitioner of a book on some special topic in the law such as the above treatise depends mainly upon two things: a clear and adequate statement of the propositions of law involved, and a complete and up-to-date marshalling of the authorities. It is gratifying, therefore, to have a new edition of this standard work, for during the last decade there have been many additions to the authorities on the subject and some decisions of considerable moment in the shaping of principles of law. The author in his preface remarks as of special

importance *Shively v. Bowlby*, which determines the power of the general government to control and dispose of tide lands in the territories, *Morris v. United States* as to the Potomac Flats, and various recent decisions upon the rights and liabilities of water companies. These last he has incorporated into a new section. In the main, however, the changes in this new edition are confined to slight additions to, or changes in, the text, and the insertion in their proper places of the decisions of the last nine years. By sticking closely to the subject in hand, Mr. Gould has avoided a pitfall into which many writers on special topics fall: namely, of swamping the valuable and special part of the work in a sea of allied topics, often carelessly and inadequately treated. Under "Public Waters" are considered property in tide-waters at common law and in this country, rivers and lakes, the public right of navigation, riparian rights and boundaries. In Part II., which deals with "Private Waters," there is a discussion of rights of riparian proprietors in the natural flow and condition of the stream, appropriation and rights acquired by priority, eminent domain, surface and subterranean waters, mines, contracts and covenants, prescription, severance of tenements, remedies, at law, in equity, and by statute. There is the usual table of cases cited — some eleven thousand — and an admirable index.

But few inaccuracies are to be found in the text. *Gould v. Hudson River R. R. Co.*, 6 N. Y. 522, is tentatively referred to as representing the New York law in regard to a riparian owner's rights of access; yet this decision was expressly overruled in *Rumsey v. N. Y. & N. E. R. R.* 133 N. Y. 79. Moreover, in the light of the recent case of *Scranton v. Wheeler* (see NOTES, 14 HARVARD LAW REVIEW, 451), the discussion of the doctrine of *Yates v. Milwaukee* (§ 149) will need some modification, though it is only fair to say that the construction put upon this case by the writer was that universally adopted — even by the Supreme Court itself — until the past year. The interesting decision that the back limit of riparian land is the watershed of the stream in question, *Bathgate v. Irvine*, 126 Cal. 135, does not seem to be noted, although the case is cited in support of several less important points. Another error is the citing of the same case, and no other, for apparently opposite sides of one proposition — and this in the same section (§ 120). *Heron v. The Marchioness*, 40 Fed. Rep. 330. But in proportion to the whole these mistakes are slight. In the main the work has that accuracy, clearness, and fulness of citations so necessary in a special treatise. It will undoubtedly prove highly valuable to the profession.

E. S. T.

THE SOURCES AND LITERATURE OF ENGLISH HISTORY FROM THE EARLIEST TIMES TO ABOUT 1485. By Charles Gross, Ph. D. London: Longmans, Green & Co. 1900. pp. xx, 618.

Mr. Gross has endeavored to do for English history what has been accomplished for Germany and France by Dahlmann, Waitz, Wattenbach, and Monod. He has placed within one treatise a full bibliography of all the printed materials which would be useful to any student of the legal, constitutional, political, social, and economic history of England, Ireland, and Wales. The selection is not restricted to books and papers directly historical in their character, but extends to treatises on archæology,

architecture, numismatics, etc., whose aid in understanding history is none the less substantial because less direct. The author has in one respect departed from the scheme followed by his continental predecessors, in that the volume is not a mere enumeration of books. It contains at the beginning of each section a summary of the matter treated therein. In addition all the more important treatises are followed by a short outline of their contents as well as an estimate of their trustworthiness and general usefulness. This innovation should prove of the greatest assistance to those who consult this work.

The volume is excellently arranged. Part I. deals with general and introductory subjects: Historical method, bibliography, the journals, reviews, and proceedings of societies, the public record office and other archives, general collections of chronicles and records, and the general treatises of modern writers. Part II. contains a survey of the authorities for the history of Britain during the Celtic, Roman, and Early German periods while Parts III. and IV. relate to the Anglo-Saxon times and to the history of England from the Norman conquest to 1485. In Part II. separate sections, and in Parts III. and IV. separate chapters are concerned with modern writers. The consistent separation of sources and treatises should be of great help to the student. The full reference to the continental authorities bearing upon the general subject and the attention paid to the reports of societies and to other periodicals are especially to be commended. The index is exhaustive and the cross-references excellent. The appendices, notably Appendix D., which contains a chronological table of the principal sources, should prove invaluable. The work under discussion will undoubtedly fill a want long severely felt by all students of the history of England.

H. F.

We have also received:—

ATLAS AND EPITOME OF DISEASES CAUSED BY ACCIDENT. By Dr. Ed. Golebiewski. Translated from the German by Pearce Bailey, M. D. Philadelphia: W. B. Saunders & Co. 1900. pp. 549. This book treats chiefly of the functional disabilities and diseases which result from injuries. Such a large percentage of the jury trials of the present day are concerned with accident cases, especially since employees' accident insurance companies have arisen, that a slight familiarity with medicine and medical terms is almost essential to every jury lawyer. The present book having been written with special reference to accidents under the German insurance laws, and, although primarily intended for the medical profession, being nevertheless comparatively elementary, is admirably adapted to a lawyer's use. The different parts of the body, and the diseases incident to them, are considered in turn, and, as there is a good index, any special knowledge required may be readily found. Many specific cases are given in detail, and throughout the book is profusely illustrated.

PROCEEDINGS OF THE OREGON BAR ASSOCIATION AT THE EIGHTH AND NINTH ANNUAL MEETINGS, held at Portland, Oregon, on November 15 and 16, 1898, and November 21, 1899. Portland, Oregon: Commercial Printing Co. 1900. pp. 172.

AN ADDRESS BY MR. JUSTICE STORY ON CHIEF JUSTICE MARSHALL. Delivered in 1852, at the request of the Suffolk (Mass.) Bar. Rochester, N. Y.: The Lawyers Cooperative Publishing Co. 1900. pp. 60.

NEW YORK STATE LIBRARY BULLETIN 54. December, 1900. Legislation by States in 1900. 11th Annual Comparative Summary and Index. Albany: University of the State of New York. 1900. pp. 441-612.

THE DIFFICULTIES OF OBTAINING JUSTICE. A popular science lecture. Delivered by request before the Denver Philosophical Society, November 22d, 1900. By Oscar Reuter. pp. 32.

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SEQUESTRATION OF WITNESSES.¹

THE expedient of separating a party's witnesses, in order to detect falsehood by exposing inconsistencies, seems to have been early discovered and long practised in various communities. Though probably not in itself older or more widespread than some other fundamental notions of proof, nevertheless its age and universality have come to be more emphasized in our own legal annals because of the instance recorded and handed down in the apocryphal Scriptures. The story of Daniel's judgment in Susanna's case has given to this expedient a unique and classical place in our law as well as in our literature :—

The History of Susanna : "[Two elders coveted Susanna, a very fair woman and pure, the wife of Joacim ; they tempted her, but she resisted ; then they plotted, and charged her with adultery ; and she was brought before the assembly ;] and the elders said : ' As we walked in the garden [of Joacim] alone, this woman came in with two maids, and shut the garden doors, and sent the maids away. Then a young man, who there was hid, came unto her, and lay with her. Then we that stood in the corner of the garden, seeing this wickedness, ran unto them. And when

¹ This term for the process of placing prospective witnesses out of the hearing of a testifying witness has precedent in the usage of Louisiana (37 La. An. 463), of Texas (3 S. W. 539), and of Georgia (Code Index, s. v. "Witness"), and seems preferable to any other ; there is indeed no other single term in acceptance. In the Southern States, by an early usage of obscure origin, it is termed (*e.g.* in 2 Swan 257) "putting under the rule," the word "rule" being merely the original English term for "order of court."

we saw them together, the man we could not hold, for he was stronger than we and opened the door and leaped out. But having taken this woman, we asked who the young man was, but she would not tell us. These things do we testify.' Then the assembly believed them, as those that were the elders and judges of the people. . . . [But Daniel,] standing in the midst of them, said : . . . 'Are ye such fools, ye sons of Israel, that without examination or knowledge of the truth ye have condemned a daughter of Israel.' . . . Then Daniel said unto them, 'Put these two aside, one far from another, and I will examine them.' So when they were put asunder one from another, he called one of them, and said unto him : ¹ 'Now then, if thou hast seen her, tell me, under what tree sawest thou them companying together?' who answered, 'Under a mastick tree.' And Daniel said, 'Very well ; thou hast lied against thine own head.' . . . So he put him aside, and commanded to bring the other, and said unto him, ² . . . 'Now therefore tell me, under what tree didst thou take them companying together?' who answered, 'Under an holm tree.' Then said Daniel unto him, 'Well ; thou hast also lied against thine own head.' . . . With that, all the assembly cried out with a loud voice, and praised God who saveth them that trust in him. And they arose against the two elders, for Daniel had convicted them of false witness, by their own mouth. . . . From that day forth was Daniel had in great reputation in the sight of the people."

The story of Susanna's vindication, sanctioned as it was by its place in the Scriptures, came to serve as a powerful argument in English courts, after the spread of printing and the popularization of the Bible made the people at large familiar with it. From almost the beginning of our recorded trials, the story is found repeatedly cited, and was a favorite text of invocation for those who hoped in the same way to prove their innocence.³ Meantime, however, it is

¹ Here Daniel, in several lines of vituperation, prophesies the elder's downfall ; it would seem that this indicates a desire to anger and confuse the witness, preventing him from recollecting the details of his story if he had invented one.

² Here again came disconcerting anathema.

³ *Circa* 1460, Sir John Fortescue, L. C., in his *De Laudibus Legum Angliæ*, c. 21, dilates on the marvel of its success.

Other examples : 1603, Sir Walter Raleigh's Trial, *Jardine Crim. Tr.*, I, 419 ("My lords, for the matter I desire, remember too the story of Susannah ; she was falsely accused, and Daniel called the judges 'fools, because without examination of the truth they had condemned a daughter of Israel,' and he discovered the false witnesses by asking them questions") ; 1683, Sidney's Trial, 9 *How. St. Tr.* 817, 861 (cited by Sidney, arguing for himself), 1684, Rosewell's Trial, 10 *id.* 147, 190 ; 1696, Cook's Trial, 13 *id.* 311, 348, note ; Fenwick's Trial, *ib.* 537, 722 ; 1725, Braddon, *Observations on the Earl of Essex's Murder*, 9 *id.* 1229, 1278, 1283, 1294.

There appears to be no mention of it in the recorded trials about the time of the great dramatist's earlier life in London ; but one likes to imagine that his "Daniel come to judgment" was inspired by the tale of some trial known to him in which

clear that the expedient already had in English practice an independent and continuous existence, even in the time of those earlier modes of trial which preceded the jury and were a part of our inheritance of the common Germanic law. It appears to have been customary to examine separately the secta-witnesses¹ and the transaction- and document-witnesses,² as well as other persons from whom a consistent story was expected in order to obtain legal action;³ and the process seems to have had substantially the same object and probative operation that we find in it to-day :

1318, *Anon.*, Pl. Ab. 351, col. 1, London:⁴ "The justices immediately called the four witnesses before them and examined each of them separately as to the making, sealing, and place and time, how and when [an alleged deed of release was made], and other necessary circumstances touching the deed. . . . [Three of the four had said that] on a certain Thursday they all came together to the manor . . . and found there this said Richard, who showed them the said writing and said it was his deed. Each of them was asked, separately and by himself, at what hour they came there, and in what building in the manor Richard showed them the writing, and how he was dressed. One of them said that they came there in the morning before sunrise, and that the writing was shown to the four witnesses in the queen's chamber in the manor, and Richard was dressed in a German tunic *de medleto*, and was shod in white shoes. The second said that they came at six o'clock, and the writing was shown

appeal to this story had furnished a theme for popular discussion; it could not have been Raleigh's trial, for the lines in the "Merchant of Venice" had already been printed some three years.

¹ See instances from Bracton's Note-Book, cited in Thayer, Preliminary Treatise on Evidence, 14.

² See instances collected *ib.* 20, 22, 98; Pollock and Maitland, *Hist. Eng. Law*, II, 635, 637. To these add the following: 1158(?), Wallingford and Oxford *v.* Abbott Walkelin, Bigelow's *Plac. Ang. Norm.* 198, 201 (controversy over a right of market; a number of men of the county were chosen in order by their oaths to decide the claim, but "*segregati, qui jurarent, diversis opinionibus causam suam confundebant*," and their diversities are then stated in detail).

³ The expedient was used in examining the summoners in a writ of mortdancerster; Britton, b. iii. c. 10, § 9 (Nichols, ii. 92) (as to re-summons in mortdancerster, where the tenant denies that he was first summoned, "let the summoners be examined, and if upon examination they are found to disagree in the circumstances of the summoning, let the tenant be adjudged quit as to the default, and the summoners in mercy. And if they are found to agree, then he may defend the summons by his law.") See also, for this, Fleta, b. v. c. 3, § 7; b. vii. c. 6, §§ 12, 13, 20. A good example of this practice with the summoners occurs in Bracton's Note-Book, pl. 10, where "*omnes discordant adinvicem*." Compare also the proceeding with the grand jury, quoted in Stephen, *History of the Criminal Law*, I, 258. In short, it would seem that the value of the practice was well understood on all hands, and that it was resorted to in any sort of proceeding in which it was appropriate.

⁴ As quoted in Thayer, *ubi supra*, 99.

to the four witnesses at this hour in the hall of the manor. The third said that they came, all at the same time, at nine o'clock, and Richard showed them the writing in the stable of the manor and he had on a black cloak. The fourth witness, William de Codinton, said that he never came to the manor with the said three witnesses, and never knew or heard of the making of the writing "except from the others' report. And judgment was given against the deed.

It was natural enough, when trial by jury had developed and the jurors had come to rely much upon the testimony of witnesses brought into court before them (that is, perhaps, after the 1400's¹), that the ancient expedient should continue to be applied in these new conditions. From the beginning of this epoch, and onwards, it is clear that the practice was well known and often used.² There is perhaps no testimonial expedient which, having as long a history, has persisted in this manner without essential change.

The employment of this practice of course crossed the water with the common law. To-day, in many jurisdictions of the United States, statutes have expressly (though unnecessarily) made provision for sequestration, usually concerning its employment before committing magistrates; and occasionally the statute serves to determine one of the mooted points hereafter to be noticed.³

¹ Thayer, *Preliminary Treatise*, 122.

² Examples: *Circa* 1460, *Fortescue*, *De Laudibus Legum*, c. 26; 1571, *Duke of Norfolk's Trial*, *Jardine's Crim. Tr.*, I, 191; 1600, *Earl of Essex's Trial*, *ib.* 349; 1665, *Guilliams v. Hulie*, 1 *Sid.* 131; 1684, *Rosewell's Trial*, 10 *How. St. Tr.* 147, 160; 1696, *Charnock's Trial*, 12 *id.* 1396; 1754, *Canning's Trial*, 19 *id.* 330; 1775, *Trial of Maharajah Nundocomar*, 20 *id.* 934; 1793, *Hudson's Trial*, 22 *id.* 1021.

³ *Ariz.* P. C. § 1346 (committing magistrate may exclude all witnesses while one is examined, and may also cause them to be kept separate); § 1347 (he may also on defendant's request exclude all persons except prosecutor, counsel, officers having defendant in custody, and clerk).

Ark. Stats. 1894, § 1995 (on accused's request, committing magistrate may exclude all persons except clerk, peace officer, prosecutor, accused, parties' attorneys, and witness under examination); § 1996 (he may also cause the witnesses to be kept separate from each other and out of hearing of the witness deposing); § 2963 ("If either party require it, the judge may exclude from the court-room any witness of the adverse party not at the time under examination, so that he may not hear the testimony of the other witness").

Cal. P. C. § 867 (committing magistrate "may exclude all witnesses who have not been examined; he may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they are all examined"); § 868 (he "must also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney-general, the district attorney of the county, the defendant and his counsel, and the officers having the defendant in custody"); C. C. P. § 2043 ("If either party requires it, the judge may exclude from the court-room any witness of the adverse party").

Conn. Gen. St. 1887, § 2016 (coroner may sequester witnesses).

Probative Purpose and Operation. The process of sequestration consists merely in preventing one prospective witness from

Ga. Code, 1895, § 5280, Cr. C. § 1017 ("In all cases, either party has the right to have the witnesses of the other party examined out of the hearing of each other; the court will take proper care to effect this object as far as practicable and convenient; but any mere irregularity shall not exclude the witness").

Ida. Rev. St. 1887, § 6075 (like Cal. C. C. P. § 2043); § 7574, 7575 (like Cal. P. C. §§ 867, 868).

Ill. Rev. St. c. 361 (committing magistrate may exclude, during a witness's examination, other witnesses, or separate the witnesses so that they cannot converse with each other until they have been examined).

Ia. Code 1897, § 5225 (committing magistrate may exclude all witnesses except the one testifying, and may cause witnesses to be kept separate); § 5226 (he must also exclude on defendant's request all persons except the attorneys and certain officers).

Kan. G. S. 1897, c. 102, § 50 (committing magistrate may in discretion exclude all witnesses not being examined, and "may direct the witnesses for or against the prisoner to be kept separate so that they cannot converse with each other until they shall have been examined").

Ky. C. C. P. 1895, § 601 (judge may order separation, not to include parties or court officers); C. Cr. P. §§ 62, 63 (committing magistrate may order separation, and must on request of either party; but not so as to exclude the defendant, his counsel, or the prosecutor).

Mass. St. 1894, c. 536, § 4 (separate examination authorized, in proceeding to free a person under restraint, of the person and of witnesses); St. 1895, c. 355, § 2 (same for witnesses in election inquest); St. 1894, c. 444, § 4 (same for fire marshal's inquest).

Miss. Comp. L. 1897, § 11852 (committing magistrate may sequester witnesses).

Minn. Gen. St. 1894, § 7145 (committing magistrate may in discretion exclude all witnesses not testifying, and may direct "the witnesses for or against the prisoner to be kept separate" until examined).

Mont. P. C. §§ 1678, 1679 (like Cal. P. C. §§ 867, 868); C. C. P. § 3371 (like Cal. C. C. P. § 2043).

Neb. Comp. St. 1899, § 7026 (committing magistrate, "if requested, or if he sees good cause," shall order separate examination, and separation of witnesses on one side from those on the other).

Nev. Gen. St. 1885, § 4043 (during defendant's examination before committing magistrate, witnesses on either side shall not be present; and magistrate may exclude all unexamined witnesses during examination of one, and may cause witnesses to be kept separate and be prevented from conversing with each other until all are examined); § 4044 (he shall on defendant's request exclude all persons except clerk, prosecutor and counsel, attorney-general, district attorney of county, defendant and his counsel, and officer having him in custody).

N. H. Pub. St. 1891, c. 252, § 11 (sequestration allowable on preliminary examination by magistrate).

N. M. Comp. L. 1897, § 3384 (committing magistrate may exclude all unexamined witnesses during another's examination, and may keep witnesses apart and prevent them from conversing until all have been examined).

N. Y. C. Cr. P. § 202 (committing magistrate may sequester witnesses while others are examined, and must do so while defendant is examined).

N. C. Code, 1883, § 1149 (before committing magistrate, no witnesses are to be present during accused's examination; during any witness' examination, others may be sequestered).

hearing another's testimony.¹ But the probative service thereby rendered is somewhat different according as the witnesses separated are called for opposing parties or for the same parties.

(1) If the hearing of an *opposing witness* were permitted, the listening witness could thus ascertain the precise points of difference between their testimonies, and could shape his own testimony to better advantage for his cause. The process of separation, then, is purely preventive; *i. e.* it is designed, like the rule against leading questions, to deprive the witness of suggestions as to the false shaping of his testimony.

N. D. Rev. C. 1895, §§ 7958, 7959 (like *Cal. P. C.* §§ 867, 868, adding, "and such other person as he may designate" after "defendant and his counsel").

Oh. Rev. St. 1898, § 7148 (committing magistrate may "if requested, or if there is good cause therefor," order separation of witnesses).

Or. C. C. P. § 831 (like *Cal. C. C. P.* § 2043); *C. Cr. P.* § 1601 (committing magistrate "may exclude the witnesses who have not been examined during the examination of the defendant or during the examination of a witness for the State or the defendant").

Tenn. Code, 1896, § 5599 (party is not to be put under the rule when he is a witness); § 7020 (committing magistrate may sequester witnesses).

Tex. C. Cr. P. 1895, § 699 (at either party's request, witnesses on both sides may be removed so as not to hear testimony of any other witness); § 700 (those on one side may or may not be separated from those on the other, as court directs); § 701 (party requesting separation may designate some or all for the purpose); § 702 (witnesses thus sequestered are to be instructed not to converse about the case nor to read reports of testimony).

Utah Rev. St. 1898, § 3477 (like *Cal. C. C. P.* § 2043); §§ 4668, 4669 (like *Cal. P. C.* §§ 867, 868); § 696 (exclusion of spectators in trials involving indecencies; "provided that in any cause the court may in its discretion, during the examination of a witness, exclude any and all other witnesses in the cause").

Vt. Stats. 1894, § 1235 (separation allowable in discretion, on demand of either party, in county court); § 1982 (separate examination of witnesses demandable by either party in criminal cases).

Va. Code, 1887, § 3967 (witnesses may be sequestered by committing magistrate).

W. Va. Code, 1891, c. 155, § 13 (committing justice may sequester witnesses).

Wis. Stats. 1898, § 4788 (committing magistrate may in discretion exclude witnesses other than the one examined, and may cause the separation of "the witnesses for or against the prisoner").

Wyo. Rev. St. 1887, § 3172 (like *Oh. Rev. St.* § 7148).

¹ 1460, Fortescue, *De Laudibus Legum Angliæ*, c. 26 ("And if necessity requires, the witnesses may be separated, until they have testified to whatever they intended, so that what one says shall not instruct or warn another how to testify consistently"); 1824, Kirkpatrick, C. J., in *State v. Zellers*, 7 N. J. L. 226 ("The less a witness hears of another's testimony, the more likely he is to declare his own knowledge simply and unbiassed"); 1872, Freeman, J., in *Wisener v. Maupin*, 2 Baxt. 342, 357 ("The object being to prevent the witnesses with feelings interested from being prepared to meet the statements of witnesses already made, and to compel them to rely on their own memory for the accuracy of their statements without being warped or influenced in their statements by what they have already heard deposed").

(2) But the separation of *witnesses on the same side* may do something more than this. It is equally preventive, in that it deprives the later witness of the opportunity of shaping his testimony to correspond with that of the earlier one. But it is, additionally, detective in its effects; *i. e.* it exposes their difference of statement on points in which, had they truly spoken, they must have made identical statements. This variance of statements is the significant achievement of the witnesses' separation, and seems to rest for its probative cogency on two salient circumstances, namely, that the witnesses speak upon the same side, and that the subject of their statements is the details of a single occurrence. (a) The first circumstance serves to remove uncertainty, by fixing unmistakably upon one party's case the whole burden of error. Where two persons, claiming to have been present on the same occasion with equal opportunities of observation, are called upon opposite sides and contradict each other, the contradiction does not of itself establish anything; it may indicate that one of the two is falsifying, but it does not indicate one rather than the other as the falsifier; it is still open to either side to claim its witness as the truthful one, so that neither side is clearly fixed with the error or falsity. But where both speak for the same party, contradicting each other, it is manifest without anything further that the error is upon that particular side; the result is achieved by mere comparison of statements, without the necessity of first granting credit to an opposing witness and without any of the troublesome uncertainty which arises from being forced to weigh their respective credits. (b) The second circumstance, mentioned above, emphasizes the probability of a downright manufacture of testimony. The truth of the main fact is put forward by the party as confirmatively established by the harmony of their joint testimony; and, where two persons come purporting to have observed the same event in the same way, the details of that fact, necessarily and equally open to their observation at the same time, ought to produce the same harmony of impression, and therefore of testimony. If, then, that harmony disappears upon further questioning as to these details, one of two inferences follows: Either (1) there is an honest mistake, in observation or in memory, on the part of one; but the former is less likely to the extent that the one fact was necessarily connected in observation with the other,¹ and the latter is almost impossible where (as is usual) the

¹ The well-known and common deceptions of the senses (as expounded in Mr. Sully's treatise on Illusions and elsewhere) need not here be taken into account, because usually they may be supposed to have affected both witnesses equally.

statements are positive, and therefore mere failure of memory does not serve to explain ; moreover, even an honest mistake as to details shows the probability of a mistake on the main fact. Or, (2) there is a collusive arrangement, or a deliberate intention by one, to testify falsely ; for if, on connected matters of detail, which by the operation of the senses ought equally to have produced identical impressions and therefore identical statements, there is no harmony, then the apparent harmony of statement on the principal fact can be explained only ¹ as artificial, *i. e.* as the result of an individual plan or a combination to manufacture false testimony. This not only discredits one or both of the witnesses in all their testimony, but also throws suspicion on the entire mass of evidence of that party, if this fabrication by the witnesses may seem to have been known to him. More concisely and less accurately : If matters A, B, C, and D must have happened together, then a disagreement as to the tenor of matters B, C, and D, by witnesses called on the same side to prove A, indicates probable perjury by one or more as to A, and possible subornation of perjury by the party.

The weight of this exposure of contrary statements is of course diminished according to the degree of possibility of honest mistake, which in turn depends upon the necessariness of connection between the facts testified to and upon the extent to which one or more of the witnesses venture positive statements as to details. Moreover, the expedient is not invariably successful even where perjury does exist, because either a concerted working out of false details, or a cautious failure of memory, beyond the circle of the main fact, may sometimes baffle all efforts at detection. But when all allowances are made, it remains true that the expedient of sequestration is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice. Its supreme excellence consists in its simplicity and (so to speak) its automatism ; for, while cross-examination, to be successful, often needs the rarest skill, and is always full of risk to its very employers, sequestration does its service with but little aid from the examiner, and can never, even when unsuccessful, do serious harm to those who have invoked it.

From the following passages some illustrations of its operation may be gathered : —

1679, *Kerne's Trial*, 7 How. St. Tr. 707, 709 ; charge of being a priest ;

¹ Except for the alternative (1) *supra*.

two women, Edwards and Jones, were offered to testify to hearing him say mass. Defendant: "I desire to ask her what discourse she had with Mary Jones, the other witness, for she has been instructing her what to say, and that they may be examined asunder;" which was granted. L. C. J. Scroggs: "Did she [Jones] tell you what she could say?" Edwards: "She did." L. C. J.: "What?" Edwards: "She went once to hearken, and she heard Mr. Kerne say something in Latin, which she said was mass." L. C. J.: "Call the other woman; you shall now see how these women agree." Clerk: "Call Mary Jones." L. C. J.: "Let the other woman [Edwards] go out. . . . What did you tell her you could say?" Jones: "I told her . . . he said somewhat aloud that I did not understand." L. C. J.: "Did you not tell Margaret Edwards that you heard him say mass?" Jones: "No, my lord." L. C. J.: "Call Margaret Edwards again. Margaret Edwards, did Mary Jones tell you that she heard Mr. Kerne say mass?" Edwards: "Yes, my lord." Jones: "No, I am sure I did not, for I never heard the word before, nor do not know what it means." L. C. J.: "So they contradict one another in that."

1683-1725, *Braddon's Observations on the Earl of Essex's Murder*, 9 How. St. Tr. 1229, 1276; the Earl of Essex, in 1683, suspected of plotting with Protestants against Charles II, had been found dead in the Tower with his throat cut; it was given out as a suicide; but Braddon collected much evidence to prove that a band of ruffians, hired by the Papist Duke of York, who succeeded in 1685 as James II, had murdered the Earl; three of the guards had deposed, however, to giving the Earl a razor at his request just before his death. Braddon, who was convicted of seditious libel, afterwards published a defence, in which the guards' story is thus dealt with: "That this story, of the delivering the razor to my lord a little before his death, is the forgery of those who were privy to my lord's murder, appears very plain from the notorious contradictions as to the time of delivering this razor to my lord [for one said he delivered it the day previous, another put it at the early morning of the same day, and the third at a few moments before his death]. . . . If any gentleman shall say that all these three attendants upon my lord at the time of his death agree in this, viz. that there was a razor delivered to my lord when prisoner in the Tower, and that their contradictions are only in the point of time when this razor was delivered to his lordship—it is true they are [only] circumstantial contradictions in the time of delivering this razor to my lord of Essex. And the contradiction of the two elders, in their charge of adultery against Susanna, was only in point of the place where they took Susanna in adultery. For the first of those elders swore that they took Susanna in adultery under a mastick-tree; but the second swore it was under a holm-tree; but both these conspiring accusers agreed in the main, viz. that they took her in adultery. Yet nevertheless, by their contradictions as to the tree under which they

pretended to have taken her in adultery, Daniel convinced the whole court, which before had rashly condemned Susanna, that those two conspiring accusers had falsely sworn against Susanna. . . . And I never yet heard any person deny Daniel's wisdom and justice in this detection. . . . [Had the coroner, in the Earl's case, caused the three guards to be separately examined and their contradictions been exposed, then the jury must have believed] that they were all three pre-engaged falsely to swear what might influence the coroner and his jury to believe that my lord himself cut his own throat. . . . That those warders and servant, who would have proved my lord *felo de se*, have for that purpose sworn what is false in every material part of their evidence, doth plainly appear from this one consideration or maxim relating to proofs, viz.: When two or more who pretend to be co-witnesses to a fact shall contradict one another in some material circumstance relating to that fact, those contradictions strongly conclude that they have sworn falsely."

1685, *Oates' Trial*, 10 How. St. Tr. 1079, 1158; in this trial the notorious perjurer was at last brought to book; the case turning upon the truth of Oates's statement that he was in London on a certain day, and his witnesses having differed widely in their description of his dress when he was seen by them, Oates complained: "What does it signify, my lord, whether the wig were long or short, black or brown?" L. C. J. Jeffreys replied: "We have no other way to detect perjuries but by these circumstances, . . . as in a controversy about words, were they spoken in Latin or in English, and so to all places and postures of sitting, riding, or the like; as you know the perjury of the elders in the case of Susanna was by their different testimony in particular circumstances discovered."

Demandable as of Right. A difference of judicial opinion exists as to whether sequestration is demandable as of right, or is grantable only in the trial Court's discretion. It seems properly to be demandable as of right, precisely as is cross-examination. In the first place, it is simple and feasible. In the next place, it is so powerful and practical a weapon of defence that no contingency can justify its denial as being a mere formality or an empty sentimentality. In the third place, in the case when it is really useful (namely, a combination to perjure), it is almost the only hope of an innocent opponent. After all is said and done, the fact remains (as Sir James Stephen has declared, out of a lengthy experience as a criminal judge¹) that successful perjury is always a possible feature of human justice. No rule, therefore, should ever

¹ Hist. Crim. Law, I, 403 ("Under particular circumstances, no really effectual protection against perjury ever has been or ever can be devised").

be laid down which will by possibility deprive an opponent of the chance of exposing perjury. Finally, it cannot be left with the judge to say whether the resort to this expedient is needed; not even the claimant himself can know that it will do him service; he can merely hope for its success. He must be allowed to have the benefit of the chance, if *he* thinks that there is such a chance. To require him to show some probable need to the judge, and to leave to the latter the estimation of the need, is to misunderstand the whole virtue of the expedient, and to deny it in perhaps that very situation of forlorn hope and desperate extreme when it is most valuable and most demandable: —

1870, *Sneed, J., in Rainwater v. Elmore*, 1 Heisk. 363, 365: "The lawyer who has practised long in jury cases cannot have failed to observe that the practice of permitting witnesses to hear each other's testimony has often resulted in a great and gross abuse of public justice. Human nature is frail, and that frailty is as often illustrated in the witness box as elsewhere. The witness in an excited litigation often becomes the mere partisan of the litigant whose cause he represents. . . . [He often] lapses into the conviction that the scene before him is a mere tilt and tourney, in which he enters to overturn and countervail the testimony of the adverse party. He has heard the evidence of his own party in regard to the transaction, and perhaps he remembers it somewhat differently; but a conflict would be fatal, and he often reasons his flexible conscience into the opinion that his own memory is at fault and the statement of his confederate is the true version; and he therefore corroborates it. He has heard the testimony of the adverse party, and his ingenuity is taxed at once to strike it where it is vulnerable and to destroy it; a brief and whispered conference behind the bar, and he finds one of his own party who saw the transaction as he saw it; and the thing is done. Of what value is cross-examination — that most efficacious test of truth — under such circumstances? The witness who is disposed to ignore the truth may now defy the onset of the most skilful cross-examination; and even he who would fain lean towards an honest story finds himself confounded, and often yields his own conviction, to adopt the strong, emphatic statements of another. The object of the trial is to elicit the truth; but under such circumstances and in an excited controversy the truth is as often smothered as disclosed. . . . This doctrine, that upon the mere motion or suggestion of a party it does not seem a matter of right [to order the witnesses' separation], appears to be traceable to the darker ages of English jurisprudence. . . . We have no hesitation in declaring that such a doctrine cannot stand the test of principle, and that it is utterly incompatible with the perfect enjoyment of the right of a fair trial guaranteed by the laws to the citizens of this country."

The most that ought to be conceded to the judge is to refuse an order of sequestration where it does not appear to be asked in good faith, *i. e.* not in the honest hope of exposing false testimony, but merely to obstruct the trial or to embarrass the opponent's management of his case.

A few Courts concede that sequestration is demandable as of right;¹ but the remainder, following the early English doctrine,² hold it grantable only in the trial Court's discretion;³ declaring

¹ 1837, *R. v. Murphy*, 8 C. & P. 307 ("almost a right for the opposite party"); 1852, *R. v. Newman*, 3 C. & K. 260 (ordered if the opponent insists, even where the witness is also the prosecutor); 1874, *Meeks v. State*, 51 Ga. 429, 432, *semble*; 1897, *Shaw v. State*, *ib.* 29 S. E. 477; 1871, *Walker v. Com.*, 8 Bush 86, 89, 96, *semble*; 1881, *Salisbury v. Com.*, 79 Ky. 425, 432; 1824, *State v. Zellers*, 7 N. J. L. 224 ("the strict rule is that they [defendant's witnesses] should be out of court [during the prosecution's testimony]"); 1852, *Nelson v. State*, 2 Swan 237, 257; 1870, *Rainwater v. Elmore*, 1 Heisk. 363 (see quotation *supra*; but the motion must be supported by affidavit); 1869, *Gregg v. State*, 3 W. Va. 705, 709; more than a dozen other jurisdictions reach the same result by statute (*ante*, p. 478).

² 1696, *Cook's Trial*, 13 How. St. Tr. 311, 348 (L. C. J. Treby: "It is not necessary to be granted for the asking; for we are not to discourage or cast any suspicion upon the witnesses, when there is nothing made out against them; but it is a favour that the Court may grant, and does grant sometimes, and now does it to you; though it be not of necessity"); 1696, *Vaughan's Trial*, *ib.* 485, 494 (L. C. J. Holt: "You cannot insist upon it as your right, but only a favour that we may grant"); 1741, *Goodere's Trial*, 17 *id.* 1003, 1015. It was said, however, to be granted as of right to the crown: yet this is doubtful. That it should be treated as a mere favor to the accused was natural enough in the 1600's, when the accused could not as of right have his own witnesses sworn or even called. In the taking of evidence before the Houses of Parliament there was sequestration as a matter of course for all cases: 1811, *Berkeley Peerage Trial*, *Sherwood's Abstract*, 151; 1828, *Taylor v. Lawson*, 3 C. & P. 543.

³ Besides the following rulings, the statutes cited *supra* have often a bearing; 1849, *McLean v. State*, 16 Ala. 672, 673; 1867, *Wilson v. State*, 52 *id.* 299, 303 (but "should rarely if ever be withheld"); 1898, *McClellan v. State*, *id.* 23 So. 653; 1897, *People v. McCarty*, Cal. 48 Pac. 984; 1853, *Johnson v. State*, 14 Ga. 55, 62 (but intimating that it is the right of the prosecution); 1860, *Errissman v. Errissman*, 25 Ill. 136; 1850, *Porter v. State*, 2 Ind. 435 ("a favor, it is true, rarely refused"); 1898, *Parker v. U. S.*, Ind. Terr. 43 S. W. 858; 1871, *Hubbell v. Ream*, 31 Ia. 289, 290 (but it is "rarely withheld"); 1900, *State v. Davis*, *id.* 82 N. W. 328; 1895, *Kentucky Lumber Co. v. Abney*, Ky. 31 S. W. 179; 1899, *Baker v. Com.*, *id.* 50 S. W. 54; 1893, *State v. Hagan*, 45 La. An. 839, 840; 1892, *Com. v. Follansbee*, 155 Mass. 274, 277; 1893, *Com. v. Thompson*, 159 *id.* 56, 58; 1882, *People v. Hall*, 48 Mich. 482, 487, *semble*; 1887, *People v. Burns*, 67 *id.* 537; *People v. Machen*, *id.* 59 N. W. 664; 1895, *People v. Considine*, *id.* 63 N. W. 196; 1895, *Johnston v. Ins. Co.*, *id.* 64 N. W. 5; 1860, *State v. Fitzsimmons*, 30 Mo. 236, 239; 1895, *State v. Duffey*, *id.* 31 S. W. 98; 1884, *Binfield v. State*, 15 Neb. 484, 487; 1996, *Halbert v. Rosenbalm*, 49 *id.* 498, 506; 1894, *Murphy v. State*, *id.* 61 N. W. 491; 1898, *Chicago, B. & Q. R. Co. v. Kellogg*, *id.* 74 N. W. 403; 1819, *State v. Sparrow*, 3 Murph. 487, *semble* (neither defendant nor prosecution may claim it as a right); 1881, *People v. O'Loughlin*, 3 Utah, 133, 144; 1851, *Benaway v. Coyne*, 3 Chandl. 214, 219.

usually, however, that in practice it is never denied, at any rate for an accused in a criminal case. There is no reason for a distinction between civil and criminal cases; successful perjury is an equally deplorable result, in whatever form it overwhelms its victims.

Mode of Procedure. (1) The *time* for sequestration begins with the delivery of testimony upon the stand and ends with the close of testimony. It is therefore not appropriate during the reading of the pleadings or the opening address of counsel;¹ any danger of improper suggestions at such times is to be dealt with in other ways. It continues for each witness after he has left the stand,² because it is frequently necessary to recall a witness in consequence of a later witness's testimony. It need not be demanded at the very opening of the testimony; at any time later, when the supposed exigency arises, the order may be requested.³

(2) The sequestration may be asked for by *either party*.⁴ But even though the party sees no exigency or does not care to incur the enmity of some opposing witness, or for other reasons fails to ask, the order may be made at the request of the *jury*,⁵ or by the *judge* of his own motion.⁶

(3) The *notification of withdrawal* is accomplished either by furnishing a list to the sheriff specifying the witnesses on either side and obtaining an order from the Court directing him to take them apart; or, more simply, by obtaining an order notifying all prospective witnesses to withdraw from the court-room:—

1858, *Hanly, J.*, in *Golden v. State*, 19 Ark. 590, 598: "The course in such case is either to require the names of the witnesses to be stated by the counsel of the respective parties by whom they were summoned, and to direct the sheriff to keep them in a separate room until they are called for; or, more usually, to cause them to withdraw by an order from the bench accompanied with notice that if they remain they will not be examined."

1833, *Gantt, J.*, in *Anon.*, 1 Hill S. C. 251, 254: "It is usual and proper, as was done in this case, to furnish a list so as to enable the sheriff to

¹ 1851, *Benaway v. Coyne*, 3 Chandl. Wis. 214, 219. The following ruling seems unsound: 1876, *Penniman v. Hill*, 24 W. R. 245, *Hall, V. C.* (not granted during the reading of affidavits).

² 1874, *Roach v. State*, 41 Tex. 261, 263.

³ 1837, *Southey v. Nash*, 7 C. & P. 632 (here, after the demandant's own witnesses had testified).

⁴ This is assumed on all hands; the statutes cited *ante* usually mention it.

⁵ 1681, *Earl of Shaftesbury's Trial*, 8 How. St. Tr. 759, 778.

⁶ 1867, *Wilson v. State*, 52 Ala. 299, 303; 1880, *Ryan v. Couch*, 66 id. 244, 248.

see that they withdraw. But the parties may, if they choose, decline making out lists, and by doing so they would be under the obligation of keeping their respective witnesses out of court. . . . But there is no necessity to put down the names of witnesses who are not in attendance; when they do attend, the party intending to swear them must either put their names on the list or see that they do not come into court before they are called to testify."

(4) The process itself involves three parts: (a) preventing the prospective witnesses from consulting each other; (b) preventing them from hearing a testifying witness; (c) preventing them from consulting a witness who has left the stand; the last including consultation between witnesses who have left the stand, since they are still prospective witnesses.¹

The first element is possibly not of great importance, because before trial there has been already unrestrained opportunity for consultation; the second element is the vital one; the third is scarcely less important. The prevention applies equally as between opposing witnesses and between witnesses for the same party; though (as explained already) it is the collusion of the latter that is mainly to be prevented. The prevention is accomplished usually by placing all the witnesses in a room separate from the trial-room, under charge of an officer, who is to restrain their departure and prohibit their conversation. This simple machinery enforces the rule in all three parts of its operation. Under varying conditions, the rigor of the rule in these details may no doubt be relaxed in the trial Court's discretion.² But nothing should sanction any indirect method of conveying to the prospective witnesses information of the testimony already given. For example, it would seem obvious to good sense that the perusal of journals reporting the testimony should be forbidden.³ On the other hand, repeating hypothetically upon examination the possible words of a former witness without suggesting whether he actually used them,

¹ These three parts are sometimes set forth in the statutes cited, *ante*, § 1837, though commonly only the first two are in terms stated; but the first, as ordinarily stated, includes the third. In judicial decisions these elements of the process are rarely stated in detail, but there can be no doubt that the common-law rule implies all three.

² 1896, *Broyles v. Prisock*, Ga., 25 S. E. 388 (the trial Court has discretion as to the instructions to be given to witnesses as to not communicating during adjournment); 1852, *Nelson v. State*, 2 Swan 237, 256 (whether they shall be locked up continuously, or be ordered to keep out of the court-house, or be allowed to disperse for meals, depends upon the trial Court's discretion).

³ *Contra*: 1861, *Com. v. Henry*, 2 All. 173, 176. The Texas statute provides against this.

may be allowable.¹ Whether an attorney in the cause may consult with a sequestered witness has been the subject of some difference of opinion;² the possibilities of abuse by unscrupulous persons (and by hypothesis there is about to be perjury, *i. e.* the rule is most needed for unscrupulous persons) are certainly great; and it seems clear, first, that it may not be done without leave of Court, and, secondly, that it may be done only aloud and in the presence of a court-officer; an honest attorney can hardly fear such regulations.

Persons to be included in the Order. (1) The party demanding the sequestration may not object to the Court's omission of certain persons from the rule. No doubt the exclusion of all may sometimes be vital to his plan; but no doubt also it usually is not; and the possibilities of abuse, by indiscriminate exclusion, would be so great that the omission of individuals from the rule may properly be left to its trial Court's discretion, without doing violence to the doctrine that sequestration, as a general principle, is demandable of right. It seems to be universally conceded that the trial Court may authorize individual omissions.³

¹ 1900, *State v. Taylor*, S. C., 34 S. E. 939 (witnesses may be told, "either correctly or incorrectly, what another witness on the same side has testified to, with a view to test the correctness of the memory or the honesty of the witness;" here the question was allowed, "If your husband says . . . is he telling the truth or a falsehood?").

² 1890, *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751, 814 (whether an agent assisting in the cause may not for some purposes consult with the witnesses without leave, not decided); 1871, *Williams v. State*, 35 Tex. 255 (attorney may confer with the witness, while under the rule, "in a proper manner"); 1877, *Brown v. State*, 3 Tex. App. 294, 310 (conference is allowable only when held in the presence of an officer of the court); *Jones v. State*, *ib.* 150, 153 ("the better practice" is to confer only in the presence "or at least by permission of the Court"); 1879, *Davis v. State*, 6 *id.* 196 (conference allowable in trial Court's discretion); 1880, *Holt v. State*, 9 *id.* 571, 580 (same for conference by defendant); 1883, *Dubose v. State*, 13 *id.* 418, 426 (trial Court's discretion); 1883, *Creswell v. State*, 14 *id.* 1, 16 (same); 1885, *Kennedy v. State*, 19 *id.* 618, 631 (same).

³ Besides the following rulings, the statutes cited *ante* frequently deal with this point: 1889, *Riley v. State*, 88 Ala. 193, 196; *Barnes v. State*, *ib.* 204, 208; 1893, *Webb v. State*, 100 *id.* 47, 52 (sheriff); 1899, *Roberts v. State*, *id.* 25 So. 238; 1892, *Vance v. State*, 56 Ark. 402 (expert witnesses to sanity); 1866, *People v. Garnett*, 29 Cal. 622 (excepting the chief of police); 1882, *People v. Hong Ah Duck*, 61 *id.* 387, 394; 1886, *People v. Sam Lung*, 70 *id.* 515 (Garnett case approved); 1859, *Thomas v. State*, 27 Ga. 287, 296; 1876, *City Bank v. Kent*, 57 *id.* 283; 1877, *Turbaville v. State*, 58 *id.* 545; 1891, *Dale v. State*, 88 *id.* 552, 557; 1893, *Central R. Co. v. Phillips*, 91 *id.* 526, 527; 1897, *Shaw v. State*, *id.* 29 S. E. 477 (though the exclusion is a right, the trial Court has a discretion; here the remaining of two witnesses to assist in the prosecution was held not improper); 1898, *Keller v. State*, *id.* 31 S. E. 92; 1851, *Johnson*

(2) The *party against whom the demand is made* has no right to the omission of any specific person, other than himself and his counsel, from the order of exclusion; the trial Court's discretion here also must control. For example, it cannot be insisted that members of the party's family¹ or expert witnesses² remain in court. Frequently, however, trial Courts sanction the omission of a prospective witness whose assistance in the management of the cause is under the circumstances indispensable.³ Under the English practice, where the *attorney* has no official status in the trial, his case was no different from that of other witnesses, and the trial Court's discretion might include him in the order of exclusion;⁴ on the other hand, it seems clear that a *counsel* would never have been excluded, though the question seems not to have arisen there, since ordinarily a counsel would not be a witness. But in the United States, where the functions of attorney and counsel are not separated, the rule for counsel would of course apply, and a counsel of record in the cause should be permitted as of right to remain.⁵

v. State, 2 Ind. 652; 1874, *State v. Baptiste*, 26 La. An. 134, 136 (physicians); 1882, *State v. Revells*, 34 id. 381, 383; 1885, *State v. Ford*, 37 id. 443, 463; 1880, *State v. Hughes*, 71 Mo. 633, 636; 1895, *State v. Whitworth*, id. 29 S. W. 595 (father of the prosecutrix in a rape case); 1879, *McMillan v. State*, 7 Tex. App. 142, 144; 1881, *Johnson v. State*, 10 id. 571, 577 (medical experts); 1884, *Spear v. State*, 16 id. 98, 114 (same); 1886, *Leache v. State*, id. 3 S. W. 539; 1898, *Dement v. State*, Tex. Cr. 46 S. W. 917; 1898, *Johnican v. State*, id. 48 S. W. 181 (clerk of court); 1899, *Buchanan v. State*, id. 52 S. W. 769; 1881, *People v. O'Loughlin*, 3 Utah 133; 1877, *State v. Hopkins*, 50 Vt. 316, 322, 332 (here, the sheriff); 1886, *State v. Lockwood*, 58 id. 378 (deputy sheriff); 1886, *State v. Ward*, 61 id. 153, 179 (attorney not employed in the case); 1898, *Jackson v. Com.*, Va. 30 S. E. 452.

¹ 1889, *McCuff v. State*, 88 Ala. 147, 150; 1879, *People v. Sprague*, 53 Cal. 491; 1894, *May v. State*, 94 Ga. 76; *Hinkle v. State*, ib. 595; 1886, *Bond v. State*, 20 Tex. App. 421, 437.

² 1899, *Roberts v. State*, Ala. 25 So. 238.

³ 1848, *R. v. O'Brien*, 7 State Tr. N. S. 1, 45 (reporter to seditious speeches; being also engaged to report the evidence for the prosecution at the trial, he was not obliged to leave the court with the other witnesses; Blackburne, C. J.: "There is no stern rule of the kind; they are all subject to be modified by reasonable construction"); 1880, *Ryan v. Couch*, 66 Ala. 244, 248 (a witness who has "acquired such an intimate knowledge of the facts, by reason of having acted as the authorized agent of either of the parties, that his services are required by counsel," should not be excluded; here, the father of the absent plaintiff); 1893, *Central R. Co. v. Phillips*, 91 Ga. 526, 527.

⁴ 1826, *Pomeroy v. Baddeley*, Ry. & Mo. 430 (Littledale, J., allowed an attorney to remain, "his assistance being in most cases necessary"); 1831, *Everett v. Lowdham*, 5 C. & P. 91 (Bosanquet, J., allowed him "under the circumstances" to remain).

⁵ 1841, *State v. Brookshire*, 2 Ala. 303; 1872, *Wisener v. Maupin*, 2 Baxt. 342, 357. *Contra*: 1882, *Powell v. State*, 13 Tex. App. 244, 252 (depends on discretion). The statutes cited *ante* often expressly provide for this point.

The case of the *party himself* is more difficult. It is apparent that the danger of an attempt to falsify testimony and the utility of sequestration to expose it are most emphatic for a party who is a prospective witness.¹ On the other hand, the party's aid in the conduct of the cause may be indispensable, and his absence is in any case hardly consistent with his general right to protect his interests by watching the conduct of the trial; in the United States, or in most parts of it, these considerations (looking to the ordinary relations of client and counsel) are probably more forcible than in England, where the counsel has more independence and professional authority. The simple solution, avoiding both horns of the dilemma, would be to exempt the party from the order of exclusion, but to require him to take the stand first of the witnesses on his side; on the principle that, though he has the right to be present, yet he has also the duty to do all that is feasible towards preventing suspicion and subserving the opponent's right to sequestration. This particular solution, however, seems not yet to have been reached by any court.² A few courts treat the party upon the footing of other witnesses;³ but others declare him entitled of right to remain,⁴ and the latter view has been generally preferred in legislation.

¹ 1872, *Freeman v. J.*, in *Wisener v. Maupin*, 2 Baxt. 342, 357 ("The reason of the rule applies with equal, if not more, force to their case than to the disinterested witness"); 1881, *Hargis v. J.*, in *Salisbury v. Com.*, 79 Ky. 425, 432 ("He of all others, except the wilfully corrupt, is most obnoxious to the rule").

² But it has been suggested: 1874, *Trippe v. J.*, in *Tift v. Jones*, 52 Ga. 538, 542 ("It would be a proper rule that such party should be first examined, unless there be reasons to the contrary, in the absence of his other witnesses; this would preserve his right to be present in the court during the whole trial of his case").

³ Besides the rulings in this note and the next, the statutes cited *ante* often make express provision: 1876, *Penniman v. Hill*, 24 W. R. 245 (Hall, V. C., said that parties may equally be excluded); 1879, *Randolph v. McCain*, 34 Ark. 696 (Eakin, J.: "It would be dangerous to give him, as a matter of right, exceptional advantages, when he of all others, if assailable at all by the temptation to concoct evidence, would have the greatest interest in doing so"); 1874, *Tift v. Jones*, 52 Ga. 538, 540, 542; 1881, *Salisbury v. Com.*, 79 Ky. 425, 432 (prosecuting witness); 1872, *Wisener v. Maupin*, 2 Baxt. 342, 356 (the Tennessee statute cited *ante* was passed to override this decision; see the citation in the next note).

⁴ 1853, *Charnock v. Dewings*, 3 C. & K. 378 (Talfourd, J., held "that on constitutional grounds he had no authority to order the defendants to leave the court so long as they behaved with propriety"); 1856, *Constance v. Brain*, 2 Jur. N. S. 1145; 1858, *Selfe v. Isaacson*, 1 F. & F. 194; 1880, *Pyan v. Couch*, 66 Ala. 244, 248; 1880, *Chester v. Bowen*, 55 Cal. 46, 48, *semble*; 1895, *Kentucky Lumber Co. v. Abney*, Ky. 31 S. W. 279 (but the chief officer of a corporation-party is not a party); 1892, *Richards v. State*, 91 Tenn. 723, 724 (exclusion of one co-defendant during testimony of another, improper); 1897, *Lenoir Car. Co. v. Smith*, 100 Tenn. 127 (an officer of a

Disqualification as a Consequence of Disobedience. If the order of exclusion is knowingly disobeyed, the Court unquestionably has the power to refuse to admit the disobedient person to testify; and it ought to exercise this power, in its discretion, whenever there appears any reason to believe that the proposed testimony was important, that the witness had heard the other testimony, and that he wished to know its tenor. It may be assumed that the power should not be exercised unless the witness, as above said, was aware of the order of exclusion;¹ for the burden of causing every witness to be notified, and thus of preventing inadvertent violation, may fairly be placed upon the party demanding the sequestration. But granting this much, it follows that the most appropriate and only effective means of enforcing an order of court and of securing the right of sequestration is to have it clearly understood that disqualification as a witness may follow disobedience:—

1874, *Trippé, J.*, in *Bird v. State*, 50 Ga. 585, 589 (the counsel for defendant stated when the rule for separation was made that he had no witnesses, and was warned by the Court that if he brought any later they would be excluded; later, he brought two, whom he admitted were known to him when the order was made): "It was said a fine might have been imposed. That would not have vindicated the rule of law involved. . . . Either party would think it but poor compensation for the loss of an important right in a trial to have the other party or counsel fined. Courts should have summary power to enforce the rules of law in such cases, so that by their practical working they may be vindicated in all their integrity. If any right were lost, it was wilfully and defiantly thrown away."

There is, no doubt, something to be said against this rigorous doctrine, at least where the disobedience has occurred without any connivance of the opposing party and solely through the witness's own contumacy:—

1840, *Napton, J.*, in *Keith v. Wilson*, 6 Mo. 435, 441: "Will it be contended that a party is bound to watch his witnesses to prevent their misconduct? . . . If a witness's contumacy be a sufficient ground to warrant the Court in excluding him altogether, notwithstanding it appears that it was through no connivance or default of the party to the suit, an unavail-

corporation "charged with the duty of looking after its interests in a pending trial" is within the statute giving parties the right to remain; otherwise "corporations will be excluded from its benefits altogether"); 1899, *Heaton v. Dennis*, ib. 52 S. W. 175 (principal beneficiary under a will is a party, under the statute). The party's obedience to an improper order of exclusion does not prevent him from taking advantage of his objection: *Heaton v. Dennis*, *supra*.

¹ And there must of course have been an express order of sequestration; 1883, *R. v. Furley*, 3 State Tr. N. S. 543, 564.

ing and reluctant witness might, by wilful and intentional disobedience to the order, at any time deprive the party of the benefit of his testimony."

1849, *Caldwell, J.*, in *Laughlin v. State*, 18 Oh. 99, 102: "When we consider the little control that a party can have over his witnesses; the little attention he is likely to be able to give to their movements; the crowds and the confusion that generally exist during exciting trials; the questions that may arise on the trial that could not be anticipated, and which may require bystanders to be called in as witnesses, who have been present and heard the other witnesses testify, — these, and other considerations which might be presented, render it difficult and we think impossible to establish any general rule of exclusion that would not in many cases deprive parties of important and necessary testimony for the fair presentation of their cause."

1880, *Crawford, J.*, in *Rooks v. State*, 65 Ga. 330: "To exclude him might deny the party of the testimony of the only person in the world by whom he could prove his innocence."

1883, *Elliott, J.*, in *Davis v. Byrd*, 94 Ind. 525 (dealing with a case where the party himself was entirely innocent): "It is difficult to imagine any principle of law which will justify the punishment of an innocent party for the contumacious behavior of a witness. A litigant has no authority over the witnesses subpoenaed by him, and is not answerable for their wrongful conduct, and he ought not to be denied a right because a wrong has been committed for which he is neither morally nor legally responsible. It may be a very serious punishment to be deprived of the testimony of a witness; and if the party himself is free from fault, this punishment should not be visited on him."

But there are several answers to these arguments. In the first place, the fact that the opposing party would be deprived of valuable testimony is in itself no wrong, provided he himself has by connivance invited it. In the next place, it is usually very difficult to prove this connivance, and to require it proved might entirely nullify the rule. Again, if the witness is in fact open to the charge of fraudulent evasion, he is an unsafe and untrustworthy witness; a party has no absolute right to the testimony of a trickster, and he cannot complain, even though himself innocent, at the loss of tainted testimony; the argument of some of the judges above quoted erroneously assumes that the party could successfully prove something in his favor by a witness whose conduct has already suggested the strong probability that he will falsify. Furthermore, of two innocent parties, the contingency of suffering should clearly be for him whose witness has been in fault; and this is particularly so where it was also that party's duty, at whatever inconvenience, to secure the obedience of his own witnesses to a plain and simple

order of court. The refusal to admit to testify need of course not be an absolute and peremptory consequence of disobedience. No one has ever contended for this; the trial Court, on all the circumstances, is to determine whether this measure should be taken. But it seems clear that the Court may properly take the measure in its discretion, even where no connivance by the party is made to appear.

The difference of judicial opinion in the precedents arises chiefly over the case of a witness's wilful disobedience without the party's connivance. The English rulings have fluctuated, and the question seems there not to be settled.¹ In the United States, the great majority of Courts hold in general that the Court may in discretion disqualify the witness; some of these Courts, however, making the proviso that the party must have connived.² The other

¹ 1775, *Cardigan Case*, 3 Doug. El. C. 2d ed. 174, 229 (may be excluded); 1776, *Worcester Case*, ib. 239, 265 (same); 1790, *Doe v. Cox*, Cliff. El. C. 114 (Gould, J., refused to admit the witness, but the court in banc held this erroneous); 1819, *R. v. Webb*, per Best, J., cited in 3 Stark. Evid. 1733 (may be excluded); 1821, *Attorney-Gen'l v. Bulpit*, 9 Price 4 (Exchequer; "It is a sacred and inflexible rule" that the witness shall be rejected); 1829, *R. v. Boyle*, 1 Lew. Cr. C. 325, Bayley, J., and others (must be admitted); 1829, *R. v. Colley*, M. & M. 329 (Littledale & Gasilee, J., held it discretionary); 1830, *Parker v. W. William*, 4 Moo. & P. 480, 6 Bing. 683, C. P. (exclusion rests with the judge's discretion; the exchequer rule being conceded to require exclusion); 1831, *Beamon v. Ellice*, 4 C. & P. 585 (Taitton, J., admitted the witness, with hesitation); 1835, *Cook v. Nethercote*, 6 C. & P. 741 (Alderson, B., refused to exclude the witness); 1836, *Thomas v. David*, 7 id. 350 (Coleridge, J., said that it was "entirely in the discretion of the judge"); 1842, *Chandler v. Horne*, 2 Moo. & Rob. 423 (Erskine, J., said that the rule of discretion formerly prevailed, but now it was settled that the witness could not be excluded); 1852, *Cobbett v. Hudson*, 1 E. & B. 11 (Lord Campbell, C. J., said that "the better opinion" was that the judge could not exclude the witness).

² In the following citations the rule is understood to be laid down generally, except where the proviso is expressly noted; but in some of the rulings probably the proviso would have been stated if the facts had called for it: 1841, *State v. Brookshire*, 2 Ala. 303; 1853, *Sidgreaves v. Wyatt*, 22 id. 617; 1867, *Montgomery v. State*, 40 id. 684, 687; 1870, *Bell v. State*, 44 id. 393, 395; 1875, *Wilson v. State*, 52 id. 299, 303; 1892, *Thorn v. Kemp*, 98 id. 417, 423; 1895, *Sanders v. State*, id. 16 So. 935; 1855, *Pleasant v. State*, 15 Ark. 624; 1858, *Golden v. State*, 19 id. 590, 597 ("the right of excluding witnesses for disobedience, though well established, is rarely exercised;" here, not exercised against one who was not known to be needed); 1874, *Bird v. State*, 50 Ga. 585, 588; 1881, *Butts v. State*, 66 id. 508, 513, *semble*; 1881, *Lassiter v. State*, 67 id. 739, *semble* (see the construction of this case in *Grant v. State*, *infra*); 1886, *Etheridge v. Hobbs*, 77 id. 531, 534; 1887, *Carson v. State*, 80 id. 170, *semble*; 1890, *Bone v. State*, 86 id. 108, 121; 1892, *Grant v. State*, 89 id. 393; 1893, *Perguson v. Etcherson*, 91 id. 785, 787; 1880, *Bulliner v. People*, 95 Ill. 394, 399; 1896, *Goon Bow v. People*, id. 43 N. E. 593; 1850, *Porter v. State*, 2 Ind. 435; 1860, *Jackson v. State*, 14 id. 327; 1875, *Davenport v. Ogg*, 15 Kan. 366 (may be excluded if the party abets the disobedience); 1886, *Haskins v. Com.*, Ky. 1 S. W. 730; 1860, *State v. Gore*, 15

Courts seem to forbid in general terms the disqualification of the witness; though in some of them it can hardly be doubted that a proviso as to the party's connivance would be enforced.¹ On the whole, then, the Courts occupy a common ground where there has been fault in the party; at one extreme stand a few Courts denying disqualification even in that case; at the other extreme stand probably the majority of Courts, permitting disqualification even without the party's fault.

John H. Wigmore.

NORTHWESTERN UNIVERSITY LAW SCHOOL, CHICAGO.

La. An. 79; 1884, *State v. Watson*, 36 id. 148; 1886, *State v. Cole*, 38 id. 843, 845; 1893, *State v. Hagan*, 45 id. 839, 841; 1895, *State v. Jones*, id. 18 So. 515; 1897, *Com. v. Crowley*, Mass. 46 N. E. 415 (excluded, in the trial Court's discretion, where the counsel was in fault in knowingly allowing the witness to stay); 1897, *People v. Piper*, Mich. 71 N. W. 175 (not excluded, if party is not conniving); 1852, *Sartorius v. State*, 24 Miss. 602, 608; 1835, *Dyer v. Morris*, 4 Mo. 214, 218; 1840, *Keith v. Wilson*, 6 id. 435, 441 (except where the party is not in fault by laches or connivance); 1860, *State v. Fitzsimmons*, 30 id. 236, 239; 1888, *O'Bryan v. Allen*, 95 id. 68, 74 (like *Keith v. Wilson*); 1894, *State v. Gesell*, 124 id. 531, 536 (same); 1895, *State v. David*, id. 33 S. W. 28; 1900, *State v. Sumpter*, id. 55 S. W. 76 (inadvertent violation, without party's connivance, no ground for exclusion); 1849, *Laughlin v. State*, 18 Oh. 99, 101; 1883, *Dickson v. State*, 39 Oh. St. 73, 77 (except where there has been no procurement or connivance of the party); 1879, *Hubbard v. Hubbard*, 7 Or. 42, 47 (unless there is complicity by the party); 1836, *Earls' Trial* (Pa.), 10; 1833, *Anon.*, 2 Hill S. C. 251, 255 (except where there is no fault in the party); 1880, *Smith v. State*, 4 Lea 428, 430 (the discretion was held improperly exercised to exclude a witness unknown to the party at the time of the order); 1874, *Goins v. State*, 41 Tex. 334, 336, *semble*; 1875, *Sherwood v. State*, 42 id. 498, 501; 1878, *Ham v. State*, 4 Tex. App. 645, 673; 1880, *Walling v. State*, 7 id. 625; *Estep v. State*, 9 id. 366, 370; 1881, *Avery v. State*, 10 id. 199, 213; 1886, *Hill v. State*, id. 3 S. W. 763, *semble*; 1173, *Holder v. U. S.*, 150 U. S. 91 (may be excluded in discretion, but not merely and always for violation).

¹ 1862, *People v. Boscovitch*, 20 Cal. 436; 1853, *Johnson v. State*, 14 Ga. 55, 61 *semble*; 1880, *Rooks v. State*, 65 id. 330; 1895, *Cunningham v. State*, id. 22 S. E. (954 distinguishing *Pergason v. Etcherson*, 91 Ga. 785); 1859, *Horne v. Williams*, 12 Ind. 326 (undecided); 1883, *Davis v. Byrd*, 94 id. 525 (at least where the party himself is not in fault; repudiating prior intimations to the contrary); 1884, *Burk v. Andis*, 98 id. 59, 64 (same); 1887, *State v. Thomas*, 111 id. 515 (same); 1860, *Grimes v. Martin*, 10 Ia. 347, 349; 1899, *Parker v. Com.*, Ky. 51 S. W. 573 (a co-indictee remained, the defendant not explaining that he wished to use the other as a witness; disqualification of co-defendant held erroneous on the facts); 1887, *Parker v. State*, 67 Md. 329, 331; 1897, *Ferguson v. Brown*, Miss. 21 So. 603; 1898, *Timberlake v. Thayer*, id. 23 So. 767; 1866, *State v. Salge*, 2 Nev. 321, 326; 1819, *State v. Sparrow*, 3 Murph. 487; 1824, *Woods v. M'Pheran*, Peck 371, *semble*; 1849, *Hopper v. Com.*, 6 Gratt. 684 (obscure); 1879, *Hey's Case*, 32 id. 946, 948, *semble*; 1894, *Brown v. Com.*, 90 Va. 671, 675; 1869, *Gregg v. State*, 3 W. Va. 705, *semble*.

MUTUAL PROMISES AS A CONSIDERATION FOR EACH OTHER.

IN an article in volume VIII. of this REVIEW,¹ upon "Successive Promises of the Same Performance," Professor Williston, speaking of promises made in consideration of the performance, or a promise of performance, by the promisee of an existing contract between himself and a third person, says:² "An attempt has been made by some to distinguish unilateral and bilateral agreements. In Professor Langdell's Summary of the Law of Contracts, it is said:³ 'It will sometimes happen that a promise to do a thing will be a sufficient consideration when actually doing it would not be. Thus, mutual promises will be binding though the promise on one side be merely to do a thing which the promisee is already bound to a third person to do, and the actual doing of which would not, therefore, be a sufficient consideration. The reason of this distinction is, that a person does not, in legal contemplation, incur any detriment by doing a thing which he was previously bound to do, but he does incur a detriment by giving another person the right to compel him to do it, or the right to recover damages against him for not doing it. One obligation is a less burden than two (*i. e.*, one to each of two persons), though each be to do the same thing.' The same distinction is also involved in the discussion of the subject by Sir Frederick Pollock, in the first edition of his treatise on the law of contracts.⁴ Sir William Anson, however, pointed out a fallacy in this line of reasoning,⁵ in that it assumes that the second promise does impose an obligation upon the promisor. As both parties to a bilateral contract are bound or neither is bound, this assumption involves the further assumption that the second promise is itself a sufficient consideration to support the counter-promise, — the very point in dispute."

"It seems impossible to dispute Anson's criticism of the theory advanced by Pollock and Professor Langdell, but it has not been always observed that the same criticism may be made in the case of every bilateral contract if the test of the sufficiency of consideration is defined, as it usually is, as a benefit conferred upon the

¹ Page 27.

⁴ Page 158.

² Page 34.

⁵ Anson, Contracts (1st ed.), 80.

³ § 84.

promisor or a detriment suffered by the promisee. To enter into a binding obligation to do or not to do anything whatever is always a detriment, and on the other hand, unless a promise imposes an obligation, no promise whatever can be considered a detriment. It is, therefore, assuming the point in issue to say a promise is a detriment because it is binding. There are but two ways out of the difficulty."¹ Then, after stating the first of these ways, which he rejects, he continues: "The other way is to revise slightly the test of consideration in a bilateral contract, seeking the detriment necessary to support a counter-promise, in the thing promised, and not in the promise itself." "If the test of the sufficiency of consideration be made whether the promisee has incurred a detriment at the request of the promisor (which would constitute a unilateral contract), or has promised something the performance of which will be, or may be, a detriment (which would constitute a bilateral contract), logical consistency is attained. Nor is it attained at the expense of disregarding the authorities."² The remainder of the article is devoted to a vindication of this new definition of "consideration."

It will be seen, therefore, that Professor Williston's conclusion is that mutual promises *as such* can never be a consideration for each other. Why? Not because a *binding* promise cannot *as such* be a consideration for another promise (for Professor Williston expressly says every binding promise is a detriment to the promisor, and, therefore, is a sufficient consideration for a counter-promise), but because it is never possible to ascertain whether or not a promise is binding, when the object is merely to ascertain whether it will furnish a sufficient consideration for a counter-promise. Why is it never possible? Professor Williston gives no other reason than his assertion that a promise can never be shown to be a detriment to the promisor without an unwarranted assumption that the promise is binding on him; and of this he is quite sure, for he says there are only two ways out of the difficulty, viz., by saying that the law itself makes such an assumption (which Professor Williston very properly rejects), and by admitting that a promise *as such* can never be a sufficient consideration for a counter-promise. In short, Professor Williston has put forward a novel view of the effects or consequences of "begging the question," viz., first, that it destroys not merely every argument in which it is detected, but also every proposition which has the misfortune

¹ Page 35.

² Page 36.

to be supported by such an argument, even though such proposition be in fact true; secondly, that the proposition that each of two mutual promises *may* furnish a sufficient consideration to support the other, though confessedly true in fact, can never be proved, except by an argument which is infected with the vice of "begging the question"; and, therefore, in logic and in law, is untrue.

It is chiefly because of this "novel view" that I have felt called upon to answer Professor Williston's article.¹ I say "chiefly" rather than "only," because to assert that a writer, in supporting a given proposition, has assumed the existence of the very thing which he is professing to prove, seems nearly equivalent to asserting that he is either incompetent or dishonest, *i. e.*, that he has either deceived himself, or has attempted to deceive his readers; and if one remains silent under such an imputation, he may seem to admit the justness of it.

I propose, therefore, to show: first, that Sir Frederick Pollock and myself have not begged the question in the passages which have been quoted and referred to; and, if we have, that the only consequence is that we have not proved the proposition which we were supporting, — not that the proposition itself is untrue. Secondly, that, whenever one of two mutual promisors, who is sued upon his promise, claims that the plaintiff's promise, though it be supported by a sufficient consideration, is not binding upon him, and, therefore, is not a sufficient consideration for the defendant's promise, the question thus raised can be put in issue, tried, and decided in the same manner, and with as much facility, as any other question which will be decisive of the cause, and that the defendant must see to it that it is so put in issue, tried, and decided, if he would avail himself of it. Thirdly, that Professor Williston's mode of getting out of the difficulty which he supposes to exist is inadmissible.

Before proceeding to consider these propositions, however, it is proper to place the reader in possession of the views of Sir F. Pollock and Sir William Anson, and to make two or three preliminary observations.

The passage in Sir F. Pollock's book,² to which Professor Williston refers, is as follows:³ "In the case where the party is already bound to do the same thing, but only by contract with a

¹ If it be asked why I have not done this sooner, if I intended to do it at all, I answer that it was not till about a year ago that my attention was first called to the article.

² Published in 1876.

³ Page 158.

third person, there is some difference of opinion. But there seems to be no solid reason why the promise should not be good in itself, and therefore a good consideration. It creates a new and distinct right, which must always be of some value in law, and may be of appreciable value in fact. There are many ways in which B may be very much interested in A's performing his contract with C, but yet so that the circumstances which give him an interest in fact do not give him any interest which he can assert in law. It may well be worth his while to give something for being enabled to insist in his own right on the thing being done. This opinion has been expressed and acted on in the Court of Exchequer,¹ and seems implied in the judgment of the majority of the Court of Common Pleas in a case² decided some weeks earlier."³

The passage referred to in Sir William Anson's book⁴ is as follows:⁵ "A more difficult class of cases to reconcile with the general

¹ *Scotson v. Pegg*, 6 H. & N. 295.

² *Shadwell v. Shadwell*, 30 L. J., C. P. 145.

³ Professor Williston says (p. 37) Sir F. Pollock has withdrawn this opinion in his subsequent editions; but I think this is a mistake. In his 6th and last edition (p. 175) Sir F. Pollock says: "In the case where the party is already bound to do the same thing, but only by contract with a third person, there is some difference of opinion. The new promise purports to create a new and distinct right, which, if really created, must always be of some value in law, and may be of appreciable value in fact. B may well be much interested in A's performing his contract with C, but yet so that the circumstances which give him an interest in fact do not give him any interest which he can assert in law. The power to claim A's performance in his own right will then be valuable to him, and why may he not entitle himself to it by contract, and bind himself to pay for it? This opinion has been expressed and acted on in the Court of Exchequer, and seems implied in the judgment of the majority of the Court of Common Pleas in a case decided some weeks earlier." "The reasoning of these cases assumes that a promise to A to perform an existing duty to B is itself enforceable by A, which is not clear on principle, and has not been directly decided" (pp. 176, 177). It will be seen, therefore, that it was only on the supposition that a promise to do what the promisor is already bound to do by a contract with a third person is for that reason invalid, that Sir F. Pollock expresses a different opinion in his last edition from what he expressed in the first. In short, the difference between the first edition and the last is a difference, not in opinion, but in the supposition upon which the opinion is founded. Upon the question whether the plaintiff's promise was invalid, for the reason just stated, he merely says, its validity "is not clear on principle, and has not been directly decided." Moreover, in saying it is not "clear," I understand him to mean no more than that it is not "certain." It may be added that there is high judicial authority to the effect that the promise is valid; for in *Scotson v. Pegg* (*supra*, n. 1) Wilde, B., says: "There is no authority for the proposition, that, where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing."

⁴ Published in 1879. The first edition of my "Summary of the Law of Contracts" was published later in the same year.

⁵ Page 80.

rule are those in which it has been held that a contract is binding which is made in consideration of a performance or promise of performance by one of the parties, of a contract already subsisting between himself and a third party."

"The matter is not very easy to understand upon principle; it has been said¹ that the promise is based on the creation 'of a new and distinct right' for the promisor, in the performance of the contract between his promisee and the third party. But this is in fact to assume that a right is created, which would not be the case if the consideration for the promise were bad."

"Whether the promise is conditional on the performance of the contract, or whether it is given in return for a promise to perform, does not seem to make any difference in principle. If we say that the consideration for it is the detriment to the promisee in exposing himself to two suits instead of one for the breach of his contract, we beg the question, for we assume that an action would lie on such a promise. If we say that the consideration is the promisor's desire to see the contract carried out, we run the risk of confounding motive and consideration."²

The whole controversy had its origin in the two English cases of *Shadwell v. Shadwell* and *Scotson v. Pegg*.³ In each of them, the contract was unilateral, *i. e.*, the consideration of the defendant's promise was the plaintiff's performance (not his promise of performance) of a contract between himself and a third person. In both, the decision was in the plaintiff's favor, it being by two judges against one in the earlier case, and unanimous in the later case. In neither case was the decision based on any distinction, actual or supposed, between a performance and a promise of performance as a consideration for the defendant's promise. These decisions were supported by Sir F. Pollock, and were opposed by Sir W. Anson. In supporting them, however, Sir F. Pollock assumed the consideration of the defendant's promise in each to be, not the plaintiff's performance, but his promise of performance;⁴ and, in his last edition,⁵ he expresses the opinion, though not strongly, that performance by the plaintiff would not have been a sufficient consideration. Sir W. Anson seems to have supposed

¹ Pollock, *Contracts* (1st ed.), 158. ² Page 81. ³ *Supra*, p. 499, nn. 1 and 2.

⁴ Sir F. Pollock also says (p. 176, 6th ed.), Byles, J., in *Shadwell v. Shadwell*, "stated the rule to be that a promise to do what one is already bound, though only to a third person, to do, cannot be a consideration." I do not, however, find any such language in the judgment of the learned judge.

⁵ Page 176.

that the consideration was decided to be good, in each of these cases, whether it consisted of the plaintiff's performance or of his promise to perform, while he declares his own opinion to be that the consideration was bad, whether it consisted of the one or the other. He seems to have thought, however, that *Scotson v. Pegg* was in fact a case of mutual promises, for, in stating it, he expressly says,¹ the plaintiff promised performance of the contract between himself and the third person. Lastly, it is clear that Sir W. Anson did not suppose that his criticism of Sir F. Pollock extended to any other cases of mutual promises than those in which one of the promises was to perform a contract between the promisor and a third person; and if he had thought it applied equally to all cases of mutual promises, and that there was no other way of avoiding it than that adopted by Professor Williston, there is no reason to suppose he would have published it.

I now proceed to the consideration of the three propositions already stated:—

I. There is no begging the question in the passages which have been quoted. What was the question? It was whether a promise by one of two mutual promisors to perform a contract between himself and a third person is a sufficient consideration for the counter-promise. This is a particular question or subject, being a part, and a very small part, of the general subject of "Consideration." Indeed, it is only a small part of one branch of the general subject, viz., that branch which is designated by the title of this article. And yet it involves all or most of the fundamental principles, not only of that branch of the subject to which it belongs, but of the entire subject. It is plain, therefore, that, in treating of the particular subject, one cannot state everything upon which it is remotely dependent, and whatever he does not state he must of course assume or take for granted. Moreover, it depends upon circumstances how wide a field one ought to cover. For example, one who is called upon to argue a cause in which the particular subject is directly involved should cover a wider field than one who is writing a treatise, and the width of the field to be covered even by the former should depend, to some extent, upon the amount of instruction supposed to be needed by the court which has the cause to decide. The writer of a treatise should exclude from the particular subject, first, everything which does not come within the scope of his plan; secondly, everything which will more properly find a place in some other part of the treatise

¹ 9th edition, p. 97.

of which the particular subject is a small portion. For example, it was proper for me to exclude from § 84 the more general question whether mutual promises will in any case support each other, as I had already considered that question in § 81. So, also, it was proper for me to exclude from § 84 the question whether the defendant's promise, as well as the plaintiff's, was binding, provided it had a sufficient consideration to support it; for, first, I had already informed the reader in § 82 that, if either of two mutual promises was not binding, the other would be without consideration, and so both would fall to the ground; secondly, the law presumes every promise to be binding which is supported by a sufficient consideration, unless the contrary appear, and, therefore, it presumes both the promises to be binding in the case in question; thirdly, it was no part of my plan to consider in what cases a promise, though supported by a sufficient consideration, will not be binding. What, then, was the object of that part of § 84 which Professor Williston quotes? Simply to state the difference, in the case there put, between performance and a promise of performance, as a consideration for a promise, with the reason for that difference. Everything necessary to raise that question, besides what I stated, of course I assumed to exist, and, therefore, I assumed that each of the promises, if supported by a sufficient consideration, was binding. If, indeed, I had supposed the validity of either promise to be doubtful, I should either have so informed the reader, or I should have omitted § 84; but I did not so suppose then, and I do not now.

As to Sir F. Pollock, the case is still clearer; for he meets directly the only question, respecting the consideration for the defendant's promise, about which it is possible to raise a doubt, viz., whether the plaintiff's promise, if supported by a sufficient consideration, was binding;¹ and he expresses the opinion that it

¹ It seems proper to remark that Sir W. Anson has inadvertently done an injustice to Sir F. Pollock, in making the latter seem to assume the existence of the very thing he was seeking to establish, viz., that the plaintiff's promise, in *Shadwell v. Shadwell* and *Scotson v. Pegg*, furnished a sufficient consideration for the defendant's promise; for, after stating briefly the view of Sir F. Pollock (*supra*, p. 500), Sir W. Anson says: "But this is in fact to assume that a right is created, which would not be the case if the consideration for the promise were bad." Here it is assumed that the right which Sir F. Pollock was considering was the right supposed to be created by the defendant's promise, as to which the question was whether the plaintiff's promise furnished a sufficient consideration to support it. But the right which Sir F. Pollock was in truth considering was the right supposed to be created by the plaintiff's promise, as to which the question was not whether it was itself supported by a sufficient consideration, but whether it constituted a sufficient consideration for the defendant's promise; and

was, and gives his reasons; and even if it should be admitted that some of his reasons tend rather to prove that the plaintiff's promise, if binding, was a sufficient consideration, than that it was binding in fact, it is also true that he was not bound to give reasons at all.

Admitting, however, everything that any one may choose to say as to Sir F. Pollock or myself having begged the question, the utmost that can follow is that we have not proved the proposition which we asserted; and this is all that is claimed by Sir W. Anson. Professor Williston, however, appears to think our failure was due to a cause which will inevitably be fatal to all similar attempts, and, therefore, that the proposition which we maintained is impossible of proof, and so must be deemed false. I must confess my inability even to conjecture what line of reasoning led Professor Williston to such a conclusion; and accordingly I am at a loss how to attack the conclusion itself otherwise than by simply asserting the contrary. Under these circumstances, my most feasible course seems to be to show how the proposition asserted by Sir F. Pollock and assumed by myself, if true, is to be established in a court of justice, whenever the decision of a legal controversy shall involve the question of its truth. Therefore,

II. If one of two mutual promisors be sued upon his promise, and claims that the plaintiff's promise is not binding, and, therefore, is not a sufficient consideration for the defendant's promise, the question thus raised can be put in issue, tried, and decided in the same manner, and with as much facility, as any other question which will be decisive of the cause; and the defendant must see to it that it is so put in issue, tried, and decided, if he would avail himself of it.

(a) Whenever an action is brought upon a unilateral contract not under seal, the plaintiff has two things to prove, in order to make out a *prima facie* case, viz., first, that the promise sued on was in fact made, and, secondly, that it was made for a sufficient consideration. Moreover, in order to prove the latter, he must first prove that the defendant offered to make the promise in consideration of the plaintiff's giving or doing some specified thing, and then that the plaintiff gave or did the thing specified by way of accepting the offer.

Having thus proved the making of the promise sued on, and the consideration for which it was made, the plaintiff, in the ab-

that again depended upon whether it was rendered invalid by the fact that the plaintiff was already bound, by a contract with a third person, to do the same thing.

sence of any proof by the defendant, will enforce his claim, unless the court be of opinion that the thing stipulated for by the defendant, and performed by the plaintiff, is, upon its face, an insufficient consideration for the defendant's promise, or that the promise is, upon its face, not binding, even if supported by a sufficient consideration. If the defendant claims the consideration to be insufficient, or the promise not to be binding, upon some ground which does not appear on its face, he must make out his claim by affirmative proof; for example, that the defendant was a married woman, or an infant, when the promise was made, or that the promise was obtained by fraud, or by duress; or that it is void by statute, or is illegal, or that it is within the Statute of Frauds, and the Statute has not been satisfied.¹

(b) If the contract sued on be bilateral, the plaintiff must prove the making of each of the two mutual promises, and also that each promise was made in consideration of the other. The reason is obvious; for it is only by proving the making of his own promise as well as the defendant's, and that each promise was made in consideration of the other, that the plaintiff can prove that the defendant's promise was made for a sufficient consideration. By proving as above, however, the plaintiff will, in the absence of any proof by the defendant, establish his case, unless the court shall be of opinion that one of the mutual promises, even if supported by a sufficient consideration, is not binding. If, however, the defendant claims that either promise is not binding, for some reason which does not appear upon its face, he must make out his claim by affirmative proof, as stated in the preceding paragraph in respect to the defendant's promise.

That a decision in the plaintiff's favor will necessarily involve the proposition that each of the promises is binding upon its face appears by the case of *Harrison v. Cage*.² That was an action by a man against a woman upon mutual promises to marry each other. The defendant claimed that such an action could be maintained only by the woman; and the action was confessedly one of first impression. The court, however, was of opinion that every such action brought by a woman, and in which she recovered, established the right of the man to maintain the action, as otherwise there would be no consideration for the man's promise; and so judgment was given for the plaintiff; and the correctness of the decision has never been questioned.

¹ On this subject, I take the liberty of referring the reader to my "Summary of Equity Pleading" (2d ed.), §§ 109-111.

² 5 Mod. 411.

That a promise which, upon its face, is binding will support a counter-promise, unless the former be affirmatively proved not to be binding, is shown by *Holt v. Ward*.¹ That also was an action upon mutual promises by the plaintiff and defendant to marry each other. The defendant pleaded that the plaintiff, when she made the promise, was an infant of fifteen years of age, and the plaintiff demurred to the plea. By so demurring, the plaintiff admitted the truth of the plea, and raised the question whether her promise was not a sufficient consideration for the defendant's, notwithstanding she was an infant; and the court held that it was. If the plaintiff had taken issue on the truth of the plea, of course the defendant must have proved it, or it would have gone for nothing.

So, if the consideration of a defendant's promise consist either in the plaintiff's doing, or in his promising to do, what he was already bound to do by a contract with a third person, the defendant may, by affirmatively proving that the plaintiff was so bound, raise the question whether there was a sufficient consideration for his promise; and the decision will depend upon the judgment of the court on that question.² In the absence, however, of proof by the defendant, the plaintiff will recover.

I have said that when an action is brought on a bilateral contract not under seal, the plaintiff must prove the making of each promise, and also that each promise was made in consideration of the other. How can he do this, according to Professor Williston's view? He has four things to prove, each of which is entirely independent of all the others. While, therefore, he is proving the first, he must assume the other three to be true, and, while he is proving the second, he must assume the third and fourth to be true, and so on; and yet I understand Professor Williston to be of opinion that the writer of a treatise cannot assume one of two independent things to be true for the purpose of establishing the other.

III. Professor Williston's proposed change in the definition of consideration is not admissible.

By reference to the extracts already made from Professor Williston's article,³ it will be seen that he does not propose to abolish the distinction between giving and doing and promising to give or do, as a consideration for a promise, by making the giving or doing

¹ 2 Str. 937.

² *Shadwell v. Shadwell*, 9 C. B., N. S., 159, 30 L. J., C. P., 145, and *Scotson v. Pegg*, 6 H. & N. 295, are both authorities for what is stated in the text.

³ *Supra*, p. 497.

of something the consideration in all cases ; and he will doubtless agree that that distinction cannot be abolished, as the consideration of a promise must always be strictly contemporaneous with the promise itself ; while, in the case of a bilateral contract, there is no giving or doing on either side till after the making of the promises, and the only thing that is contemporaneous with either promise is the counter-promise. In truth, the only difference between the received definition and Professor Williston's proposed definition seems to be this : according to the received definition, a promise is a sufficient consideration for a counter-promise, if it is binding, while, according to Professor Williston's proposed definition, a promise is a sufficient consideration for a counter-promise, if performance of the thing promised would be a sufficient consideration for a unilateral promise. Is such a change admissible ? I think not.

(a) The sufficiency of a promise, regarded as the consideration of another promise, must depend upon the nature, quality, or legal effect of the promise itself ; for the promise is all that the promisor gets in exchange for his promise, and is all that the promisee parts with. Performance and the right to performance must not be confounded. The promisor may get the latter at the time of his promise, but he cannot possibly get the former, unless his promise be unilateral ; and it is wholly uncertain whether he will ever get it. Performance, therefore, in the case of a bilateral contract, is both future and uncertain ; and hence, as it cannot constitute the consideration for either promise, so it cannot constitute the reason why either promise may be a consideration for the other promise. A binding promise is, moreover, while it lasts, a substitute for the performance promised, and the latter, if it takes place, operates simply as a satisfaction and discharge of the former. The two, therefore, can never co-exist, for, the moment performance takes place, the promise ceases to exist.

(b) Professor Williston's proposed change will confessedly have the effect of rendering mutual promises invalid in every case in which the thing promised by either party would not be a sufficient consideration for a unilateral promise ; and yet it is assumed that each promise, if unilateral, and made for a sufficient consideration, would be valid and binding. How does Professor Williston reconcile this with his own statement that every binding obligation is a detriment to the obligor, and, therefore, that each of the mutual promises, in the case supposed, being supported by a sufficient consideration, is valid and binding ? Moreover, how does he sup-

pose a court of justice can knowingly perpetrate such an injustice as his proposed change would involve? There seems to be but one possible answer, viz., that, according to Professor Williston's view, it can never be known, when mutual promises are the subject of an action, whether the plaintiff's promise is binding or not; and, therefore, that it must be assumed not to be binding. Such an answer, however, would be a confession that the admissibility of Professor Williston's proposed change depends upon the soundness of his reasons for thinking some change necessary.

(c) Professor Williston's proposal makes every promise, whether binding or not, a sufficient consideration for a counter-promise, provided only a performance of the thing promised would be a sufficient consideration for a unilateral promise. Suppose then a married woman enters into a bilateral contract for the purchase of a house. Except for the fact that the purchaser is a married woman, the contract is open to no possible objection, but that fact alone renders both promises void. Yet both promises fully meet Professor Williston's requirement; and, therefore, according to him, each promise is supported by a sufficient consideration; and the consequence is that the seller's promise is valid and binding, while that of the purchaser is void, not for want of consideration, but because made by a married woman. In truth, Professor Williston, while dispensing with the requirement that mutual promises, in order to be a consideration for each other, must be binding, provides no substitute whatever for that requirement; for it is of course idle to say that a promise is a sufficient consideration because of what it promises, if it furnishes no security whatever that the thing promised will be performed. Nor is it here open to Professor Williston to say that the nullity of the purchaser's promise is a thing which can never be known; for if the purchaser should defeat an action against her by the seller, on the ground that her promise was void, the court could not shut its eyes to the fact that an action by her against the seller would have been successful, at least so far as regarded the sufficiency of the consideration for the seller's promise. So if the purchaser should file a bill for specific performance, proof by the seller that the purchaser was a married woman when the contract was made would be a complete defence to the bill.

Professor Williston's conclusion is that neither doing nor promising to do what one is already bound, by a contract with a third person, to do is a sufficient consideration for a promise; and he seems to regard it as one of the merits of his definition of "consid-

eration" that it gives the same rule for both these classes of cases, for he says it is certainly "of doubtful expediency to establish so delicate a distinction between bilateral and unilateral contracts"¹ as that between doing and promising to do, in the cases in question. This last remark seems to imply that distinctions in law between unilateral and bilateral contracts are unusual; for if they are in fact so numerous as to be the rule rather than the exception, and if many of them are so wide and radical as to pervade nearly the whole subject of contracts, then surely one "delicate" distinction, more or less, cannot be very material. What, then, is the fact? It is not too much to say that there is no division of contracts, not even the time-honored one into contracts under seal and contracts not under seal, which is comparable in legal importance with the division into unilateral and bilateral contracts. Moreover, the division of "consideration" into that which consists in giving or doing and that which consists in promising to give or do, corresponds precisely and perfectly, so far as regards all contracts which require a consideration, viz., contracts not under seal, with the division of the latter into unilateral and bilateral contracts; for the consideration of every unilateral contract or promise consists in giving or doing, while the consideration of each of the promises in every bilateral contract consists in promising to give or do. In other words, that which is the consideration of every unilateral promise can never be the consideration for either of the promises in a bilateral contract, and that which is the consideration for each of the promises in every bilateral contract can never be the consideration for a unilateral promise. How then can it be said that one is drawing a "delicate" distinction when he says (with Professor Williston) that every binding promise to give or do is a detriment, and, therefore, a sufficient consideration for a counter-promise, but that giving or doing is not always a detriment, and hence is not always a sufficient consideration for a unilateral promise? Whether "delicate" or not, however, the propriety of making the distinction depends wholly upon whether it actually exists; and the way to solve that question is, not to seek for the points in which giving or doing and promising to give or do resemble each other, but to inquire as to each, separately and independently of the other, whether and why it contains the legal requisites necessary to make it a sufficient consideration for a promise. When this has been done satisfactorily, everything else will take care of itself.

C. C. Langdell.

¹ Page 37.

SACRAMENTAL FEATURES OF ANCIENT AND MODERN LAW.

IN our own system of law we have but one sacramental observance remaining, and that is the oath. But if we look into the legal systems of the past and other parts of the world we shall find many others. By a sacramental observance I mean a ceremonial appeal to divine agency characterized ordinarily by some peculiar act or "outward and visible sign," as the catechism has it, such as kissing books, burning candles, killing animals, smearing with oil, sprinkling with water, putting on a ring, laying hands on altars or relics. Our irreverent optional oath is but the soiled remnant of a once gorgeous fabric. Imagine a jurisdiction where sacramental observances are essential to the existence of all legal rights, to the validity of marriages, and to the right to succeed to property; where promises unsanctified by such observances are not binding, and witnesses not performing them are incompetent to testify; and where questions of fact, in the absence of satisfactory evidence, are habitually referred by such observances to divine determination. It will not be difficult to find all these characteristics in actual bodies of law.

In ancient times the gods were looked to constantly in the framing of laws and administration of justice as in all other matters. The decision of a judge was the judgment of a god; a statute was a divine declaration; and obedience to law was encouraged by blessings and enforced by curses. The Mosaic law will furnish us with examples:—

"And when Moses' father-in-law saw all that he did to the people, he said, What is this thing that thou doest to the people? Why sittest thou thyself alone, and all the people stand by thee from morning unto even? And Moses said unto his father-in-law, Because the people come unto me to inquire of God: When they have a matter, they come unto me; and I judge between one and another, and I do make them know the statutes of God and his laws."¹

"And the Lord spake unto Moses, saying, And thou shalt speak unto the children of Israel, saying, If a man die, and have no son, then shall ye cause his inheritance to pass unto his daughter. And if he have no daughter, then ye shall give his inheritance unto his brethren. And if

¹ Ex. xviii. 14 *et seq.*

he have no brethren, then ye shall give his inheritance unto his father's brethren."¹

"Thou shalt have a place also without the camp, whither thou shalt go forth abroad; and thou shalt have a paddle upon thy weapon; and it shall be when thou wilt ease thyself abroad, thou shalt dig therewith, and shalt turn back and cover that which cometh from thee; for the Lord thy God walketh in the midst of thy camp, to deliver thee, and to give up thine enemies before thee; therefore shall thy camp be holy; that he see no unclean thing in thee, and turn away from thee."²

"If ye shall diligently keep all these commandments which I command you, to do them, to love the Lord your God, to walk in all his ways, and to cleave unto him; there shall no man be able to stand before you; for the Lord your God shall lay the fear of you and the dread of you upon all the land that ye shall tread upon."³

"If ye hearken to these judgments, and keep, and do them, the Lord thy God will love thee, and bless thee, and multiply thee. Thou shalt be blessed above all people: there shall not be male or female barren among you, or among your cattle."⁴

"Moses charged the people, saying, the Levites shall speak and say unto all the men of Israel with a loud voice, Cursed be he that removeth his neighbour's landmark, and all the people shall say, Amen. . . . If thou wilt not hearken unto the voice of the Lord thy God, to observe his commandments and his statutes, all these curses shall come upon thee. . . . The Lord shall smite thee with a consumption, and with a fever, and with an inflammation, and with an extreme burning, and with the sword, and with blasting, and with mildew. . . . He shall bring the tender and delicate woman to eat her own children to satisfy her hunger. . . . In the morning thou shalt say, Would God it were even, and in the even thou shalt say, Would God it were morning."⁵

The Homeric king is also a judge, and his sentences and judgments come directly to his mind by divine dictation from on high.⁶ People possessing such beliefs as to the inspiration of judgments and laws would naturally attach importance to the invocation of divine wrath and divine assistance in the administration of justice, and such beliefs have obtained in different parts of the world and with varying degrees of intensity through long periods of time. The laws of Charlemagne provided that doubtful cases should be determined by the judgment of God.⁷ "There is no system of recorded law, literally from China to Peru," Sir Henry Maine says,

¹ Num. xxvii. 6 *et seq.*

² Deut. xxiii. 12 *et seq.*

³ Deut. xi. 22 *et seq.*

⁴ Deut. vii. 12, 13.

⁵ Deut. xxvii. and xxviii.

⁶ Maine's *Early Law and Custom*, 163.

⁷ Lea's *Superstition and Force*, 202.

"which when it first emerges into notice is not seen to be entangled with religious ritual and observances." ¹

In our courts to-day as difficult a problem as any may be the decision of a question of fact. But according to Sir Henry Maine, in mediæval times questions of fact were regarded as the simplest of all questions. All difficulties were avoided by referring them directly to the Lord.² They were so referred by performance of the sacramental rites known as Ordeal, Compurgation, and Wager of Battle, of which no doubt we all have some idea. Twelve men, more or less, sometimes called *sacramentales*, appeared in a church and swore upon the altar that the accused was innocent. That was compurgation.³ The compurgators did not swear to knowledge of facts. "If the accused is guilty may we be punished as if our oaths were his." That was the invocation. And the idea appears to have been that no twelve men would take such a risk of the divine wrath in a case where punishment was merited. The ordeal was the culminating feature of an elaborate religious ceremonial. The boiling water ordeal, for instance. The accused, after a period of fasting and prayer, was brought to church and partook of the sacrament; mass was celebrated, the boiling water was exorcised, — adjured by the ever-living God to manifest the truth, and, finally, the hand was plunged in.⁴ So in the case of the appeal to arms. The selected champions before the combat swore on the gospels or on relics to the justice of their respective causes, and defeat meant conviction of perjury as well as an adverse judgment.⁵ In the Middle Ages the laws regulating these tests of truth were as important a part of the *corpus juris* as the law of evidence is to-day. The Mosaic law provides for their application, and they persisted as part of the common law of England until the time of Blackstone. In 1661 a continental law student selected the cold water ordeal for witches as the subject of his thesis.⁶ The Pentateuch prescribes compurgations and ordeals. The "trial of jealousy" provided for in Numbers was an ordeal. When the wife is suspected of adultery and there are no witnesses obtainable, the husband shall bring her to the priest. Certain ceremonies shall be performed and the woman shall be compelled to drink holy water mingled with dust from the floor of the tabernacle. Finally, as the upshot of it all, we are told that if the woman is guilty her belly shall swell and her thigh shall rot.⁷ In England, as late as

¹ Maine's Early Law and Custom, 5.

² Maine's Early History of Institutions, 48.

³ Lea's Superstition and Force, 28.

⁶ Ib. 259.

⁴ Ib. 223.

⁷ Num. v.

⁵ Ib. 128.

the reign of King John, the bishops and clergy were empowered to use the ordeals of fire, hot iron, and boiling water.¹ Benefit of clergy, or the right to an acquittal by compurgation in the ecclesiastical courts, continued as an actual right until the reign of Queen Elizabeth.² And up to 1833 a creditor who brought an "action of debt," so-called, could be defeated by the oaths of compurgators, although he could avoid this defence by selecting another form of action.³ In the time of Blackstone either plaintiff or defendant, in an action to try title to land based upon the writ called a writ of right, was entitled to a trial by wager of battle. The court was to sit by sunrise, and if the defendant's champion could defend himself till the stars appeared judgment was given against the plaintiff. Otherwise the plaintiff won.⁴ The writ of right was originally, I believe, the only resource of a claimant of land, and originally, according to Blackstone, wager of battle was the only method of trying the issues joined upon such a writ. In so simple a fashion did our ancestors cut the Gordian knots of the law of real property. As late as 1638 issue was joined in an action of this kind and both sides produced champions, but the judges, by inventing reasons for delay, succeeded in preventing an actual fight.⁵ In case of acquittal of murder the widow and next of kin of the murdered man had the right to summon the accused to a new trial, and the parties to such an action had the right to refer the issues to judicial combat.⁶ In 1818, in the celebrated case of *Ashford v. Thornton*, the brother of the murdered man resorted to this proceeding, and the accused offered wager of battle and so forced the brother to withdraw.⁶

In ancient times a sacramental ritual was an essential part of the law of obligations. A man was bound not by his promises but by his vows. Sir Henry Maine says, "Some archaic codes do not mention contract at all, while others significantly attest the immaturity of the moral notions on which contract depends by supplying its place with an elaborate jurisprudence of oaths."⁷ The law of Moses was a code of the latter sort.

"When thou shalt vow a vow unto the Lord thy God, thou shalt not slack to pay it; for the Lord thy God will surely require it of thee; and it would be sin in thee. But if thou shalt forbear to vow it shall be no sin in thee."⁸

¹ 4 Blackstone, 344.

⁴ *Ib.* 337.

⁵ *Ib.* 194.

⁶ *Dent.* xxiii. 21 and 23.

² *Ib.* 365.

⁵ *Lea's Superstition and Force*, 194.

⁷ *Maine's Ancient Law*, 357.

⁸ 3 Blackstone, 346.

And Robertson Smith says the very phrase in Hebrew for making a covenant points to the sacrificial observances that accompanied such an act.¹

The Romans had a religious form of marriage,² but it was reserved for Christianity, I believe, to make a sacramental ceremony essential to the existence of the marriage state. Long before the close of the Middle Ages this had been accomplished in all Christian countries.³ A marriage unconsecrated by the sacrament of the Church was no marriage at all. This is the historical reason why for so long a time in England the ecclesiastical courts had exclusive jurisdiction of matrimonial causes.⁴ In Protestant Sweden, as late as 1873, no one not confirmed in the Lutheran faith could be legally married.⁵ In Roman Catholic countries, as we all know, the influence of the priesthood is strongly directed towards the universal use of the ceremonial of the Church, but I am not aware that it is in any country nowadays an essential to the creation of the legal status, although there are still many people, I presume, who would wish this to be the case. Only last spring a Dr. White, writing to the *New York Evening World*, subscribed his name to this assertion: "I do not believe there should be civil marriages of any kind. They should all be solemnized in church."⁶

The most interesting and important sacramental observances from the legal, and in fact any point of view, may be classed as brotherhood rites. The primitive nation was a group of men who believed themselves to be related to one another. Christians of the present day speak of themselves as brothers in a metaphorical sense. But in ancient times men of the same nationality believed themselves to be actually of the same blood. The Jews, for instance, were the seed of Abraham:—

"And he brought him (Abraham) forth abroad and said, Look now toward heaven and tell the stars, if thou be able to number them; and he said unto him, So shall thy seed be. . . . I will make thee exceedingly fruitful, and I will make nations of thee, and kings shall come out of thee. . . . I will give thy seed the land of Canaan. . . . And they blessed Rebekah and said unto her, Thou art our sister; be thou the mother of thousands of millions, and let thy seed possess the gate of those that hate thee."⁷

¹ Old Testament in the Jewish Church, 235.

² Maine's Ancient Law, 149.

³ Maine's Early History of Institutions, 60.

⁴ 3 Blackstone, 92.

⁵ Appleton's Encyclopædia, "Sweden."

⁶ N. Y. Evening World of April 20, 1900.

⁷ Gen. xv. 5, xvii. 6 *et seq.*, xxiv. 60.

Something more than mere consanguinity, however, was necessary to citizenship. The association was consecrated by common rites and sacrifices, and non-conformists were, as the Pentateuch has it, "cut off from the people," only to regain their original status by purifications and expiations.¹ It is declared in Exodus, for instance, that in the time of the Passover "whosoever eateth leavened bread from the first day until the seventh day, that soul shall be cut off from Israel."²

This belief in actual consanguinity coexisted with the practice of admitting strangers in blood to the national communion. But strangers, after due performance of the ceremonials of admission and adoption and participation in the common sacrifices, were regarded as sharing in the common lineage,³ and the institution of adoption did not prevent belief in universal kinship as a fact.⁴ Such a belief might be accepted by the mass of the people unthinkingly. And those who reflected might have found the religious ceremonial in some way mysteriously efficacious to create actual kinship just as many people believe to-day that the eucharistic ritual operates to create the real presence. St. Paul, perhaps, will furnish us with an illustration of this mode of reasoning, for it is evident that he made use of the primitive idea of national kinship in framing his theory of the Christian communion. He says, "The bread which we break, is it not the communion of the body of Christ? For we being many are one bread and one body; for we are all partakers of that one bread."⁵ Another analogy may be found in the doctrine of spiritual relationship, not yet wholly obsolete, I believe, in the Roman Catholic Church, which forbade the intermarriage of sponsor and godchild, treating the relation between the two as identical with that of actual parentage.⁶ The Mosaic law provides for the adoption and amalgamation of strangers.

"When a stranger shall sojourn with thee, and will keep the passover to the Lord, let all his males be circumcised, and then let him come near and keep it; and he shall be as one born in the land: for no uncircumcised person shall eat thereof."⁷

"No brotherhood was recognized by our savage forefathers," says Sir Henry Maine, "except actual consanguinity regarded as a fact: If a man was not of kin to another there was nothing between them. He was an enemy to be slain, spoiled, or hated as much as the wild beasts upon which the tribe made war, as belonging

¹ Maine's Ancient Law, 6.

² Ex. xii. 15.

³ Maine's Ancient Law, 126.

⁴ Maine's Early History of Institutions, 65.

⁵ 1 Cor. x.

⁶ Maine's Early History of Institutions, 239.

⁷ Ex. xii. 48.

indeed to the craftiest and cruellest order of wild animals.”¹ The gods of such a nation were their aiders and abettors in an exterminating warfare upon all outsiders. The Jews, as exhibited in the Old Testament, were such a nation, and their God was such a god.

“And they warred against the Midianites as the Lord commanded Moses, and they slew all the males. And the children of Israel took all the women of Midian captive and their little ones. . . . And Moses said unto them, Have ye saved all the women alive? . . . Now therefore kill every male among the little ones, and kill every woman that hath known man by lying with him. But all the women children that have not known a man by lying with him, keep alive for yourselves.”²

“When thou comest nigh a city to fight against it, then proclaim peace unto it, and if it make thee answer peace, and open unto thee, then it shall be, that all the people that is found therein shall be tributaries unto thee and they shall serve thee. And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it. And when the Lord God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of thy sword: But the women and the little ones, and the cattle and all that is within the city, even all the spoil thereof, shalt thou take unto thyself.

“Thus shalt thou do to the cities which are very far off from thee, which are not of the cities of these nations. But of the cities of these people which the Lord thy God doth give thee for an inheritance, *thou shalt save alive nothing that breatheth.*”³

“If thou shalt say in thy breast these nations are more than I, how can I dispossess them? Thou shalt not be afraid of them; but shalt well remember what the Lord God did unto Pharaoh and unto all Egypt. . . . So shalt the Lord thy God do unto all the people of whom thou art afraid. . . . The Lord thy God shall deliver them unto thee and shall destroy them with a mighty destruction until they be destroyed.”⁴

“When the Lord thy God shall bring thee into the land whither thou goest to possess it, and hath cast out many nations before thee, . . . and when the Lord thy God shall deliver them before thee, thou shalt smite them and utterly destroy them, thou shalt make no covenant with them, nor show mercy unto them.”⁵

The eucharist appears to owe its position as a Christian sacrament to the existence of the ancient kinship sacrifices. St. Paul treats it as analogous to them and as a substitute for them. Christians, he says, have received the adoption of sons and have been made heirs of God.⁶ Being Christ's they are Abraham's seed,

¹ Maine's Early History of Institutions, 65.

² Ex. xxxi.

³ Deut. xx. 10 *et seq.*

⁴ Deut. vii. 17, 18.

⁵ Deut. vii. 1 *et seq.*

⁶ Gal. iv. 1-7.

and heirs according to the promise.¹ The Gentiles shall be fellow-heirs and of the same body.² And to the existence of this state of affairs he declares the communion ceremonial essential.

"The cup of blessing which we have, is it not the communion of the blood of Christ? The bread which we break, is it not the communion of the body of Christ? For we being many are one bread and one body; for we are all partakers of that one bread. Behold Israel after the flesh. Are not they which eat of the sacrifices partakers of the altar?"³

The blood-shedding, beast-slaughtering observances, by which the members of a savage tribe consecrated their union for purposes of robbery and murder, transformed into the bond of union of the religion of peace and good-will! There is, perhaps, nothing very strange about this. The symbolism of war and bloodshed is adopted very naturally by humanity in all its activities, and has furnished the Salvation Army with almost an entire vocabulary for its work in propagating the gospel of Christ. The attitude of Christianity, moreover, towards the outer world has too often closely resembled that of our savage forefathers as depicted by Sir Henry Maine. "We are enjoined to smite the ungodly though he be our neighbor," says Balfour of Burley in *Old Mortality*, and the command has been obeyed almost as conscientiously since the year one as before it.

In ancient times, therefore, participation in sacramental rites was essential to citizenship. Strangers dwelling in the community might be tolerated or protected, but they had no political rights. The central principle of a system under which political rights were obtainable on no terms whatever except connection in blood, real or artificial, was sternly maintained, Sir Henry Maine says, by the ancient states.⁴ Outsiders, moreover, had, in the earliest times at least, no legal rights. The Mosaic law says, to be sure: "If a stranger sojourn with thee in your land, ye shall not vex him, but the stranger that dwelleth with you shall be unto you as one born among you and thou shalt love him as thyself; for ye were strangers in the land of Egypt."⁵ Nevertheless, according to Robertson Smith, the stranger had no legal status, and, in early times at least, the person referred to in the above passage was a stranger in process of conversion into an Israelite.⁶ So, in the early Roman Republic, Sir Henry Maine says, the principle of the absolute ex-

¹ Gal. iii. 27, 29.

² Eph. iii. 6.

³ 1 Cor. x. 16 *et seq.*

⁴ Maine's *Ancient Law*, 127.

⁵ Lev. xix. 34.

⁶ *Old Testament in the Jewish Church*, 337, and note.

clusion of foreigners pervaded the civil law no less than the constitution,¹ and such remained the case until the extension of foreign trade and the increased number of alien residents compelled amendment.

Much could be told, no doubt, by one better informed than myself, of the inferior position of non-communicants before the law since the beginning of the Christian era. But without attempting to go into that subject at length, Massachusetts and Sweden, neither of which would ordinarily be classed as a non-progressive community, may be referred to as furnishing instances of rigid applications of the ancient rule in modern times. The scholars of Johns Hopkins have found in New England interesting reversion to primeval types, and have written essays upon the Germanic Origin of New England Towns and the Village Communities of Cape Ann and Salem. Our Puritan forefathers, in framing their system of government, certainly received with great favor the doctrines of the Old Testament dispensation as to cutting off the ungodly from the people. A non-communicant could not vote.² In 1689 two ministers complained to the magistrates that a militia officer was unfit for his position because corrupt in his judgment with reference to the Lord's Supper.³ And a man was excluded from the communion for denying baptism to his infant child, and afterwards convicted of the same offence in a legal prosecution before the County Court.⁴ In Sweden it has been the law until within a few years, if it is not still the law, that every Swede who does not claim to belong to one of the dissenting sects must be confirmed at the age of fifteen and partake of the sacraments.⁵

Excommunication is a judgment excluding from sacramental rites, and when it not only purports to place the culprit in peril of eternal damnation, but does in fact deprive him of every earthly right and make him an outlaw against whom no one is bound to stay his hand, it is a most terrible sentence. Such a sentence is the natural weapon of priests, and in early times the judge was a priest. Just as the Jewish people not only made Moses their temporal and spiritual leader, but also came to him to inquire of God for the purpose of settling their disputes, so in most ancient communities, according to Sir Henry Maine, the priest was also king and judge.⁶ The Druids, according to Cæsar, were supreme judges in all public

¹ Maine's *Ancient Law*, 46.

² Brooks Adams's *Emancipation of Massachusetts*, 26. ³ *Ib.* 81. ⁴ *Ib.* 119.

⁵ *Appleton's Encyclopædia*, Sweden.

⁶ Maine's *Early Law and Custom*, 160.

and private suits.¹ In Sweden to this day the clergy in country parishes are often magistrates as well as pastors.² In the days of this priestly supremacy no assistance from a temporal arm was needed. If a Celt or Gaul refused to abide by a Druid judgment he was excommunicated, and that was the heaviest of penalties.³ Cæsar says that those whom the Druids exclude from their sacrifices "are deemed impious and accursed. Every one avoids them, shuns their approach, and avoids speech with them, lest they receive some inconvenience from contact with them. Neither is justice vouchsafed on their petition, or any honor conferred upon them."⁴

This priestly jurisdiction was perpetuated in the Middle Ages, and for long after, by the ecclesiastical courts, which dealt with many of the matters of which our lay judges now take cognizance. Our Surrogate's Courts, and the special courts of Probate and Divorce, which may still be found in certain jurisdictions, are all derived from the old ecclesiastical courts, which took exclusive charge of matrimonial matters and the settlement of estates. And the ordinary sentence of these courts and their ordinary process for enforcing their judgments, even in Protestant England, was excommunication.⁵ The statute law of the Middle Ages also prescribed this punishment, and several of the laws of Charlemagne denounced the penalty of excommunication against deserters from the army.⁶ In the time of Blackstone the lesser excommunication excluded from the sacraments, the greater from the company of all Christians. Deprivation of legal rights also followed; for the lay courts recognized the sentence and denied to the excommunicated the right to sue, to serve on a jury, or to testify as a witness. He was, moreover, subject to arrest and imprisonment until such time as he should make his peace with the Church.⁷

Excommunication is a natural resource of a judge without executive power, and the earliest courts were mere courts of arbitration enforcing their judgments by sentences of excommunication and outlawry.⁸ In England, with the growth of a well-organized executive, the ecclesiastical courts, like other tribunals, came to place their chief reliance on fines and imprisonments, and excommunications were probably decreed very much as oaths are administered now,

¹ Maine's Early History of Institutions, 31.

² Appleton's Encyclopædia, "Sweden."

³ Maine's Early History of Institutions, 39.

⁴ 3 Blackstone, 102.

⁵ Hallam's Middle Ages.

⁶ *Ib.* 101.

⁷ 3 Blackstone, 101.

⁸ Robertson Smith's Old Testament in the Jewish Church, 337; and Maine's Early Law and Custom, 170.

with a great deal of indifference to their significance on the part of all concerned. Dickens, in *Sketches by Boz*, has a humorous account of a trial at Doctors' Commons of a man for the crime of "brawling" within the precincts of a church, — getting into an altercation at a vestry meeting and threatening violence. Sentence was imposed of excommunication for a fortnight and payment of costs. Whereupon the accused addressed the court, and said: "If they 'd be good enough to take off the costs and excommunicate him for the term of his natural life instead, it would be much more convenient for him, for he never went to church at all."¹

Such were the latter days of excommunication in Great Britain. The full majesty of its power had been displayed eight hundred years before, when a Pope, of comparatively insignificant temporal power, by his judgment of excommunication deprived the greatest monarch of Europe of his supporters and his throne and brought him, a humble pilgrim, across the Alps to sue for absolution.

While we are on the subject of excommunication reference may be made to another substitute for ordinary legal process, which, like excommunication, operates by exciting a fear of supernatural punishment. The ancient Irish law told you to "fast upon a man" if desirous of compelling him to discharge a legal claim, that is to say, sit down at your debtor's door and starve yourself till he paid.² The English found this custom firmly established in India, and, according to Sir Henry Maine, it is diffused over the whole East.³ This practice comes within my definition of a sacramental observance, for it is supposed to insure to your debtor a supernatural penalty if he does not put an end to the starving process by paying up. A Hindoo commonly hires a Brahmin to fast for him. This saves him discomfort, and is moreover the best way, for the future life of a man who has caused the death of a Brahmin is peculiarly unpleasant.⁴ Fasting on a man is still common in the native Indian states and is almost always successful. It is preëminently a remedy of soldiers, resorted to to obtain arrears of pay.⁵ Sir Henry Maine suggests that the practice may be an outgrowth from the very first step towards a legal procedure, that is to say, the *pause* made by the primeval creditor for the purpose of giving his debtor an opportunity to settle before attacking him with force and arms.⁶ Sir Henry Maine is informed that a Kaffir lawsuit still begins with a warlike expedition of the plaintiff and his friends to

¹ *Sketches by Boz* — Doctors' Commons.

² Maine's *Early History of Institutions*, 39.

³ *Ib.* 297.

⁴ *Ib.* 39.

⁵ *Ib.* 297, 304.

⁶ *Ib.* 297.

the defendant's village. On arriving there they sit down quietly and await the result of their presence. And a law of King Alfred appears to require nothing more than such a pause of the seeker after justice. It says:—

"Let the man who knows his foe to be home-setting fight not before he have demanded justice of him. If he have power to beset his foe and besiege him in his house, let him keep him there for seven days but not attack him if he will remain indoors."¹

I have said that laws may be found making sacramental observances essential to the right to succeed to property. Such is the law of India to-day, recognized by the English government and administered by English judges. The Hindoo customary law, Sir Henry Maine says, makes all the rules of succession hinge on the due solemnization of fixed ceremonials at the dead man's funeral.² The sacred water and the sacred cake must be offered up. Brahmins must be feasted and presents must be made them. The laws determine which of the kindred are privileged to perform these ceremonies and by due performance they perfect their right to share in the property of the decedent. Strange as such a condition of the law seems, certain ordinary religious beliefs lead naturally enough to its existence. The dead are supposed to need in the next world the companionship, food, clothing, weapons, etc., they have enjoyed in this. The funeral sacrifices are supposed to supply these necessities. Offerings of food consumed by the priests supply in some way the ghost of the deceased with nourishment. His widow consumed upon the funeral pile passes to the next world to become again his consort. When a king of Dahomey dies large numbers of his warriors are slaughtered to provide him with a following worthy of his importance in the land beyond the grave. There is a story that one of these warriors saved himself from impending immolation by threatening to forswear all allegiance to his king when he reached the undiscovered country and make himself extremely unpleasant. In the Homeric poems are described bloody funeral rites of a similar character.³ Compassion, fear (for as we all know a dissatisfied ghost can make his presence very unwelcome to the living), respect, and honor all lead to the offering of such oblations. Then again there are gods to be propitiated who, unless

¹ Maine's *Early History of Institutions*, 297.

² Maine's *Ancient Law*, 6; *Early Law and Custom*, 71 *et seq.*; *Early History of Institutions*, 331.

³ Maine's *Early Law and Custom*, 68.

appeased, will torment the decedent, as by imprisonment in hell. Nothing is more natural, therefore, than that enjoyment of the goods of the decedent should be conditioned upon due provision for his eternal welfare. The Hindoo religious books declare the necessity of these observances, and the Hindoo law of inheritance insures their performance. "As long as relatives remain impure," says Vishnu, "the departed spirit finds no rest and returns to visit his relatives whose duty it is to offer up to him the funeral ball of rice and the water libation. Till the Sapindikirana has been performed, the dead man remains a disembodied spirit and suffers both hunger and thirst."¹ And, according to Sir Henry Maine, the English judges in the High Court of Calcutta may be seen to-day weighing the exact amount of spiritual benefit derived by the deceased Hindoo from the sacrifices of a descendant or collateral and the exact degree of blessing reflected on the kinsman who has offered the sacred water and the sacred cake.²

All this is not so wholly foreign to European jurisprudence as might be supposed. In England in former times all the personal property of a decedent became the property of the Church, which devoted a sufficient portion of it to the performance of masses for the repose of his soul before allowing any of it to pass to the next of kin.³ Hence the testamentary and intestate jurisdiction of the modern ecclesiastical courts. What creditors and the next of kin should receive appears to have been at first in the discretion of the Church. Edward I., according to Blackstone, placed some limits to this discretion and obliged the bishop to pay the debts of the deceased.⁴

In China, according to Sir Henry Maine, fully \$150,000,000 per year is spent in quieting the spirits of the dead,⁵ but I am not informed as to how Chinese law is affected by this practice. It is, however, according to the same authority, well established that in many ancient countries sacrifice was a condition of succession.⁶ The Greek orator frequently speaks of sacrifice and succession as inseparable.⁷ Religious ceremonies were necessary to the validity of Roman wills and in the time of Cicero the fees to priests for performance of these "*sacra*" had become an intolerable burden on inheritances.⁸ Naturally in ordering these observances the material well-being of the priests is not overlooked. In India the sacrificial

¹ Maine's Early Law and Custom, 71.

² *Ib.* 56.

³ *Ib.* 79.

⁴ 4 Blackstone, 425.

⁶ *Ib.* 53.

⁷ *Ib.* 78.

⁵ Maine's Early Law and Custom, 80.

⁸ Maine's Ancient Law, 185.

offering must be consumed by Brahmins. "The food eaten at a sacrifice by persons related to the giver," says the law, "is a gift offered to goblins. It reaches neither the Manes nor the Gods."¹ One fact appears to be certain, — that the expensive funeral is not a modern institution.

One of the seven sacraments of the Roman Catholic Church is the sacrament of penance. Penance is an observance for the benefit of the performer, "*pro salute animæ*," as the saying is, for the good of his soul after death, and naturally has its place in a priestly system of law. The offender is enjoined to punish himself voluntarily during life lest a worse thing befall him hereafter, and, incidentally, as in the case of masses and funeral sacrifices, performance often profits the priesthood. The Hindoo law-givers prescribed penances of the most frightful character. In case of a certain crime, for instance, the offender is commanded to enter a hollow iron image and burn himself to death by lighting a fire on both sides.² Penances were regularly imposed by the ecclesiastical courts of the Middle Ages, and by the English ecclesiastical courts as late as the time of Blackstone,³ although they were then in reality nothing but fines of money.

A notable feature of ancient life was the worship of ancestors by sacrificial rites. The Hindoo funeral rites exhibit this worship. Oblations are offered not only to the father just deceased, but to the grandfather and great-grandfather.⁴ So of the sacrifices referred to as conditions of succession in ancient times. They were exhibitions of ancestor worship.⁵ In ancient times, according to Sir Henry Maine, ancestor worship mixed itself most intimately with all family relations.⁶ Speaking of Rome, he says, "they" (the gods of the nation) "lived far away in their own Olympus, and the really effective worship of the Roman was to the Lares and Penates" (ancestors). "Their clay or metal images stood in the Lararium or Penetralia, in the innermost recesses of the house, and represented forefathers who in the earliest days had actually been buried in it before the hearth." Laban's images which Rebecca stole when she fled with Jacob are believed, I am told, to have been the images of ancestors. The dead paterfamilias was the person to receive this worship, a worship begun by those over whom he had in his life exercised paternal power and continued by remoter descendants.⁷ Such a worship his awful authority during life would tend to establish. According to some philosophers

¹ Maine's Early Law and Custom, 81.

² Ib. 36.

³ 4 Blackstone, 275.

⁴ Maine's Early Law and Custom, 55.

⁵ Ib. 53.

⁶ Ib. 58.

⁷ Ib. 76.

belief in a future life is derived from the phenomena of sleep and unconsciousness.¹ The primitive man knew that often when he was sleeping, unconscious, lying as if dead, his mind was wandering in a land of dreams. He concluded, therefore, that when a man *was* dead, *his* mind was consciously existing in a similar domain. This belief of the living person would be fortified by the fact that he often met deceased persons in his visits to the mysterious dream country. The belief in the operation of sacrificial offerings to which I have referred would naturally follow. For if a man could be transported by death to a land beyond the grave, it seemed to follow, that companions, food, arms, tools, ornaments, and other articles of utility or luxury could also be sent over by destruction of *their* material portion. Now, a person imbued with this belief, and meeting his awful parent in the land of dreams, armed with the paternal power and threatening visitations of his terrible wrath, would be very much disposed to do what he could to please him.

Herbert Spencer derives ancestor worship as follows: First, belief in ghosts; next, ghost propitiation at funerals and on other occasions; and finally persistent ancestor worship. Such may have been the beginning of sacrifice, and as Darwin traced our descent from monkeys, so in the future some learned man may derive the whole fabric of sacramental observance from the burnt or buried offerings of some prehistoric savage, terrified by the ghostly visitation of a dreaded parent.

In England and in most if not all our states modern legislation has made an affirmation tantamount to an oath for all purposes. But it is not many years since I listened to an address suggested by the fact that some state court had just shut out the testimony of a witness on the ground of lack of religious belief. When Bradlaugh was elected to the House of Commons all requirements as to oaths had been abolished except in the case of Peers and Members of Parliament. Bradlaugh appeared in the House of Commons and took the oath, but at the same time declared it had no binding effect upon his conscience. On appeal to the courts it was held that a man to whom an oath was a mere form could not make oath as required by law,² but, at the instance of Bradlaugh, a law was soon enacted making an affirmation the equivalent of an oath for *all* purposes.³ So disappeared sacramental observance as a requirement of the law of England.

¹ Maine's Early Law and Custom, 68.

² Atty.-General v. Bradlaugh, 14 Q. B. D. 667.

³ Oaths Act, 1888.

The optional oath, administered as it is at the present day, may seem a trifling, irreverent, and unworthy ceremonial, but considered as the last stone of the temple in which law was for many ages administered, it is at least an observance of the most impressive historical significance.

Albert S. Thayer.

DRAFT OF A UNIFORM DIVORCE LAW.

AT the request of the STANDING COMMITTEE ON MARRIAGE AND DIVORCE OF THE STATE BOARDS OF COMMISSIONERS FOR PROMOTING UNIFORMITY OF LEGISLATION IN THE UNITED STATES, we print the following draft of proposed uniform divorce legislation with the appended report of the committee thereon. The COMMITTEE invites criticism and requests that communications be addressed to Mr. Amasa M. Eaton, Chairman, Providence, Rhode Island.

AN ACT TO ESTABLISH A LAW UNIFORM WITH THE LAWS OF OTHER STATES RELATIVE TO DIVORCE PROCEDURE AND DIVORCE FROM THE BONDS OF MARRIAGE.

Section 1. No divorce shall be granted for any cause arising prior to the residence of the complainant or defendant in this state which was not a ground for divorce in the state where the cause arose.

Sec. 2. No person shall be entitled to a divorce for any cause arising in this state, who has not had actual residence in this state for at least one year next before bringing suit for divorce, with a *bona fide* intention of making this state his or her permanent home.

Sec. 3. No person shall be entitled to a divorce for any cause arising out of this state unless the complainant or defendant shall have resided within this state for at least two years next before bringing suit for divorce, with a *bona fide* intention of making this state his or her permanent home.

Sec. 4. No person shall be entitled to a divorce unless the defendant shall have been personally served with process, if within this state, or if without this state, shall have had personal notice duly proved and appearing of record, or shall have entered an appearance in the case; but if it shall appear to the satisfaction of the court that the complainant does not know the address nor the residence of the defendant and has not been able to ascertain either, after reasonable and due inquiry and search, continued for six months after suit brought, the court or judge in vacation may authorize notice by publication of the pendency of the suit for divorce, to be given in manner provided by law.

Sec. 5. No divorce shall be granted solely upon default nor solely upon admissions by the pleadings, nor except upon hearing before the court in open session.

Sec. 6. After divorce either party may marry again, but in cases where notice has been given by publication only, and the defendant has not appeared, no decree or judgment for divorce shall become final or operative until six months after hearing and decision.

Sec. 7. Wherever the word "divorce" occurs in this act, it shall be deemed to mean divorce from the bonds of marriage.

Sec. 8. All acts and parts of acts inconsistent herewith are hereby repealed.

FROM THE REPORT OF THE COMMITTEE ON UNIFORM STATE LAWS,
TO THE AMERICAN BAR ASSOCIATION, CONCERNING THE ACT ON
DIVORCE PROCEDURE.

It may not be out of place in this connection, for your Committee to say a word as to the purpose, wisdom and practicability and effect of this short, simple and most moderate act, which is the outcome of much deliberation and discussion extending over three years' sessions of the Conference. The act proposed attacks directly, and, we believe, effectively, three of the greatest evils, considered from a legal standpoint, of the present condition of our various and conflicting divorce laws. First, it does away largely with the scandal of migratory divorces. Second, it prevents the wrong of speedy decrees against absent defendants, who may be ignorant of any suit pending. Third, it does away with the interstate confusion arising from some few states forbidding remarriage, while a great majority of the states permit it.

The first section will prevent a change of residence being made in order to procure a divorce for a cause that is not a ground for divorce in the state where the cause arose, but is a ground in the state to which the party moves. This measure will prevent each state from having its own citizens defying its laws by simply going temporarily to another state, obtaining a divorce there that could not be obtained in the home state, and then returning to the home state after having successfully evaded its law. Migratory divorces will thus be largely stopped, and each state will preserve its authority over the marital status of its own citizens.

The next three sections on residence and service hardly need explanation to a body of lawyers. "It is well known that a fertile source of wrongdoing in divorce is afforded where divorce can be obtained without the knowledge of the other party. Theo-

retically, no divorce should ever be granted until the court has adequate proof that the other party has had notice of the pendency of the complaint.

"The object of the first part of section 4 is to secure this notice and proof of it for the court. In practice, however, provision must be made for those cases where the opposite party cannot be found. Not to provide for such a contingency would simply be to place a premium upon concealment — the party desirous of preventing divorce would simply go into hiding and then no divorce could be obtained, no matter how valid the reasons for granting it." (From Committee Report of Conference of 1899.) It seems to us that all reasonable means have been taken in this section to guard against fraud. A perusal of the proposed bill will show that with the six months' notice required after suit brought and the six months required before the decree of judgment becomes operative, at least a year must elapse before the divorce becomes final, in cases where the defendant is not personally served.

As to remarriage, we believe the views of Mr. Nelson in his recent work on Divorce and Separation, vol. 2, page 566, are almost universally shared by the profession.

"The evident intent of these statutes is to prevent the guilty party from entering into another marriage. He having been unfaithful to the obligations of the first marriage, it is presumed that he is unfit to enter into a second marriage unless he reforms. But such prohibition is in fact a restraint of marriage. It leaves at large a person who by false representations may induce an unsuspecting woman to enter into a void marriage; or if this does not occur, the unfortunate defendant who cannot marry is tempted to continue adulteries without incentive to reformation. A prohibition which restrains marriage, encourages adultery, leaves the party in a position to contract void marriages and takes away a natural incentive to reformation, should be held contrary to public policy. These considerations are sufficient to justify the repeal of such statutes."

If it is objected that this law would render the time necessary to acquire jurisdiction shorter in some few states, it is to be remembered that, different from most uniform laws which require to be absolutely identical wherever adopted, the evident object of the bill and the result desired to be obtained would not render it necessary, in carrying out the intent of the act, to have that part of it relating to the time of residence identical, or the present time of residence lowered, in any instance. As any one state can defeat,

in some respects, the purposes of this act, by not passing it, as much as though twenty allowed speedy divorces without the safeguards prescribed in this act, it seemed to the Conference not wise to put the time limit of residence beyond that of the average of all the states.

Although this bill is simply a bill of procedure, it really goes to the substance of the whole matter. Not only has the law of procedure, or the adjective law, always had a profound influence upon the substantive law, but it really becomes a part of the substantive law in this instance.

The Conference has had under consideration a bill relating to the causes for divorce, but has not deemed it advisable to recommend it for passage at this time, first, because of the great divergence of opinion in regard to the nature of the marriage contract and what are just causes of divorce, and secondly, because such a bill presented at this time with the procedure act might tend to prevent any improvement in legislation on this important subject.

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JOHN MARSHALL DAY IN THE LAW SCHOOL. — On Monday, February the fourth, the Law School took its part in the celebration general throughout the country to commemorate the one hundredth anniversary of the appointment of John Marshall to be Chief Justice of the United States. Lectures were suspended for the day, and in the afternoon Professor J. B. Thayer delivered an address in Sanders Theatre before the members of the Law School and a number of invited guests, in which the life and achievements of the great Chief Justice were ably reviewed.

THE MASSACHUSETTS TORRENS LAW BEFORE THE UNITED STATES SUPREME COURT. — On January 3, 1900, the Supreme Judicial Court of Massachusetts decided in favor of the constitutionality of the Land Registration Act of 1898 (c. 562). *Tyler v. The Judges of the Court of Registration*, 175 Mass. 71. See 13 HARVARD LAW REVIEW, 593. The case had come up on a petition for a writ of prohibition to prevent the Court of Registration from acting on an application for the registration of a parcel of land, the petitioner alleging that the claim encroached upon his own lot. He insisted that the whole act was unconstitutional, in that it might deprive some persons of their property without notice of the adverse claim, and so without due process of law, and that consequently the court established under it had no jurisdiction whatever. The Massachusetts court having supported the statute, the case was carried to the Supreme Court of the United States. That body, with four judges dissenting, has recently refused to take jurisdiction, holding that the plaintiff in error, having had notice himself, and being able therefore to contest the

claim before the Court of Registration, has as yet suffered no such injury, and has no such interest as will permit him to raise the question of the constitutionality of the act. *Tyler v. The Judges*, 21 Sup. Ct. Rep. 206.

It is a fundamental proposition that a court "will not listen to an objection made to the constitutionality of an act by one whose rights are not affected by it." Cooley, *Princ. Const. Law*, 3d ed. 166. But whether or not this principle can support the present decision is a very close question. It was argued that the plaintiff in error had a sufficient interest to raise the question of the constitutionality of the statute under the Fourteenth Amendment, in that he was in danger of losing his property by the decree of an unconstitutional court; but that, at any rate, the question whether this was so or not was not open to the Supreme Court, which must take jurisdiction under section 709 of the Revised Statutes. This section provides that a final judgment or decree in any suit in the highest court of a state, where the validity of a statute is drawn in question on the ground of repugnancy to the Constitution of the United States, and the decision is in favor of its validity, may be reexamined in the Supreme Court upon a writ of error. The constitutionality of the Torrens Law having been the only ground of decision in the highest court of Massachusetts, this case would come within the literal words of the provision; but it seems more reasonable to say that this section must be read in the light of the general principle above stated, and that the validity of the law must be "drawn in question" by one having an interest affected by it. Nor can it be true that when a state court by choice or inadvertence passes over the jurisdictional question the United States Supreme Court is bound by its action. Moreover, although it may be admitted that if this act is unconstitutional as to some people it is void *in toto*, yet the decision of the court that the plaintiff in error had as yet no sufficient interest to raise the constitutional question seems likewise correct. It is true that where a statute imposes a tax or condemns land, or makes other provisions which, if carried out, will cause immediate injury, a person so threatened seems to have such an interest as will allow him to contest the constitutionality of the enactment by a petition for a writ of prohibition, nor need he wait until his property has actually been taken. *Weston v. Charleston*, 2 Peters, 449; *Conn. River R. R. v. County Commissioners*, 127 Mass. 50. But in these cases everything has been done up to the actual seizure of the property, while in the principal case the danger of losing it is far more remote, since a regular judicial investigation into the rival claims is to intervene. The Court of Registration may decide in the petitioner's favor, in which case it would be clear that he could not contest the constitutionality of the law. *California v. San Pablo and Tulare R. R. Co.*, 149 U. S. 308. If it decides against him, he can appeal to the Massachusetts courts, and if unsuccessful may then contest the validity of the statute before the United States Supreme Court.

In postponing a decision as to the constitutionality of the Massachusetts Torrens Law until the question is raised by one whose land has actually been registered in another's name, the Supreme Court seems, therefore, to have applied correctly a well-established and salutary principle.

EFFECT OF REORGANIZATION ON CORPORATE LIABILITIES. — Where, pursuant to legislative authority, corporation A buys the property of corporation B and contracts to assume the liabilities of the latter company, does this give to the plaintiff a right of action directly against the buyer for an injury to the plaintiff's property committed by the seller before the sale? The extent of the responsibility of one corporation upon taking over the assets and franchise of another corporation for the previously incurred liabilities of the latter depends very much on the nature of the transaction. An out and out sale of the assets of a corporation to a *bona fide* purchaser for value, — a sale upon the foreclosure of a mortgage is the typical example, — if not in its nature forbidden by law, and if there is no valid existing lien, serves to pass a clear title to the purchaser free from all responsibility for the previous undertakings and misdoings of the vendor. *Hoard v. Chesapeake & Ohio Ry.*, 123 U. S. 222; *Bruffett v. Great Western R. R. Co.*, 25 Ill. 353. On the other hand, where merely formal changes occur, — as where a *de facto* corporation procures a new charter in order to become a *de jure* corporation, or a state bank is newly chartered as a national bank, — the new company is considered as a continuation of the former one, and is thus responsible for all its liabilities. *Benesh v. Mill Owners' Mutual Fire Insurance Co.*, 103 Iowa, 465; *Metropolitan National Bank v. Claggett*, 141 U. S. 520. Again, if the new corporation is formed with an intention to defraud the creditors of the old one, the transfer being either without consideration, or, if for value, so arranged as to give the old stockholders a claim upon the purchase money in advance of the creditors, it is clear that the new company is to be considered as a constructive trustee for the benefit of those with old claims. *Central of Georgia Ry. Co. v. Paul*, 93 Fed. Rep. 878 (C. C. A. 5th Cir.); *Santa Fé Electric Co. v. Hitchcock*, 9 New Mex. 156. So, too, where by authority of law two or more corporations consolidate. The new organization, it is said, has taken the benefit, and must therefore bear the burden. Hence one with a claim in contract or tort against any of the assimilated companies may have his claim satisfied from the assets of the aggregation, although the procedure may vary according to local statutory provisions. In some states such a liability must be expressly provided for in the statute authorizing the merger, while in others it is held to be implied from the very nature of the consolidation. *Louisville, etc. Ry. Co. v. Boney*, 117 Ind. 501. See *Prouty v. Michigan Southern Ry. Co.*, 52 N. Y. 363. Similarly where the statutes governing the sale by a corporation of its assets to another corporation — and in general such a proceeding requires the sanction of legislative authority — provide that the purchasing corporation be responsible for the obligations of the seller, it follows that liability will attach so as to give a plaintiff a direct right of action against the purchaser. *New Bedford R. R. v. Old Colony R. R.*, 120 Mass. 397; *St. Louis, etc. R. R. Co. v. Miller*, 43 Ill. 199. If upon a simple sale, moreover, one with a claim against the vendor should agree to look to the purchaser for satisfaction, the purchaser promising in return to pay such claimant, the latter would seem to have a right of action directly against the promisor on the principle of novation. And there may be a novation as to a tort liability as well as upon a contract. *Reed v. Nash*, 1 Wils. 305. But where this promise to assume liability is made, not to the plaintiff, but to the vendor corporation, a different question arises.

The Court of Appeals of the District of Columbia has recently passed

upon this precise point. One of the covenants in a deed of sale of the corporate property of a street railway company was that the purchaser corporation would assume and discharge all the obligations and liabilities of the seller. Relying upon this agreement, the plaintiff sued the buyer for a tort committed by the seller when in possession of the premises. The court held that this agreement could not give a right of action to one not a party to such agreement. *Capital Traction Co. v. Offutt*, 29 Washington Law Reports, 18 (Jan. 10). Had the plaintiff sued in a jurisdiction which adopts the rule in *Lawrence v. Fox* he might well have been allowed to recover. Here was a duty owing to the plaintiff from the promisee, and the contract was apparently intended to benefit the plaintiff; thus it would be within the decisions of those courts which limit the doctrine most strictly. *Durnherr v. Rau*, 135 N. Y. 219. That the liability owing from the promisee to the beneficiary was for a tort rather than upon a contract would seem to make no difference on principle. There was an asset in either case. Yet upon this exact point of allowing one with a claim for a tort to sue as beneficiary on a contract, according to the doctrine of *Lawrence v. Fox*, no direct authority has been found.

QUO WARRANTO AGAINST A COLLEGE. — While an incorporated educational institution is entitled to the same general rights and subject to the same general liabilities as are ordinary business corporations, yet from its retired and charitable nature it is less likely than are bodies of a more worldly character to exceed its powers, or, if it does so, to prove harmful to the public. For these reasons, and because of the value of such corporations to society, we find few instances in which a state has been willing to oust a college of its right to be a corporation. A late case in Ohio, however, shows that there are occasions where a college has so abused or neglected its franchise as to justify a forfeiture of its charter. *State v. Mt. Hope College Co.*, 58 N. E. Rep. 799. The trustees of the college had leased it to a man who was to act as president and to have sole control of its affairs. He proceeded to confer degrees, signed by the trustees and left in his hands for that purpose, upon the payment of stipulated sums, and the performance of a merely nominal amount of work, — sometimes even upon the applicant's promise to do the work in the future. No attendance was required, and no examinations held. The court ousted the college of its right to be a corporation, refusing to limit its judgment to an ouster merely of the powers wrongfully abused.

Every corporation is limited in its action to the powers conferred in its charter, and there is, moreover, a tacit understanding that the corporation shall exercise those powers in such a manner as to accomplish the design for which it was incorporated. *Angell & Ames, Corporations*, 11th ed. § 774. Any act done outside its powers or in abuse or neglect of its franchise may expose the corporation to the loss of its charter at the hands of the state. But unless there is a special provision in the charter that a certain act or omission shall be a cause of forfeiture, the court before which the *quo warranto* proceedings are brought has full discretion to render such a judgment as will meet the ends of justice and best subserve the interests of the public. Accordingly, where there has been a substantial performance of conditions, or where the abuse complained of is the result of mere mistake, accident, or misfortune, a court generally

will not decree a forfeiture. *State v. Farmers' College*, 32 Ohio St. 487. And where circumstances make it desirable, the court can adopt the middle course of ousting the corporation merely from the performance of the wrongful acts, allowing it to continue in the general exercise of its franchise. *State v. Benefit Association*, 42 Ohio St. 579. A judgment of ouster of the right to be a corporation is an extreme penalty, especially against educational or charitable institutions, and is justified only where the act or omission is expressly made a cause of forfeiture, or where there has been some wilful abuse or improper neglect of some part of the corporate franchise in which the public has an interest. Mere non-user of the franchise may occur under circumstances which will justify this extreme penalty. *Edgar Collegiate Institute v. People*, 142 Ill. 363. And where there has been such gross abuse as appeared in the principal case, there can be little doubt that the charter should be taken away. The selling of degrees is a clear abuse of the power to confer them, and is a distinct fraud upon the public justifying the extreme penalty. *Illinois Health University v. People*, 166 Ill. 171; *Independent Medical College v. People*, 182 Ill. 274. Even if direct participation in this could not be brought home to the trustees, yet they were clearly guilty of an unwarrantable neglect of a duty owing to the state. Public sentiment at the present day demands a reasonably high standard in educational institutions, and it is well for such corporations to remember that they are not exempt from the penalty of civil death.

PAROL AGREEMENTS TO SAVE HARMLESS ON COVENANTS. — That parol agreements which vary the express promises of a deed will not be recognized is a well-settled doctrine. A parol promise as consideration for a deed, however, which does not vary the covenantor's promise, may be shown, although differing from the consideration expressed in the instrument. Whether or not recognition will be accorded to a parol agreement which, while in terms it does not contradict the deed, yet negatives its effect by providing that the covenantee shall be saved harmless from all liability under its covenants, is an extremely doubtful question. The point is suggested by a recent Texas decision. *Johnson v. Elmen*, 59 S. W. Rep. 253. The defendant conveyed land to the plaintiff with an implied warranty against incumbrances. At the time there were outstanding against the defendant two notes which constituted a vendor's lien on the land. The plaintiff undertook to pay off these notes as part payment, and at his request no mention of them was made in the deed. He failed to pay, and the land was sold by foreclosure. He then brought an action on the covenant against incumbrances. The court held that the defendant's parol promise defeated the action, its effect being not to except the incumbrance from the terms of the covenant, but to show that, as between the parties, it had been discharged at the time of the conveyance, so that there had been no breach. While the decision in its reasoning is in accord with a majority of the few decisions in point, if it is to be supported otherwise than as an exception to the parol evidence rule, it must be on the ground that the plaintiff promised to save the defendant harmless from any liabilities under his covenant. *Blod v. Wilkins*, 43 Iowa, 565. For at the time the warranty was made the incumbrance as a matter of fact existed, and to hold it discharged as between

the parties is only another way of saying that it may constitute an exception to the terms of the covenant.

If the general principle is accepted, it is evident that there was a breach the moment the warranty was made, giving a right to nominal damages. The parol promise to pay off the notes could have been shown by the defendant, as it contradicted no term of the deed, and did not negative the defendant's liability. But this would only show that in paying off the incumbrance — and allowing the land to be taken by foreclosure must be regarded as payment — the plaintiff suffered no substantial damage, as had the defendant's warranty been true, and the notes formed no incumbrance, the plaintiff, being still under an obligation to pay them, would have been to the same extent out of pocket. It is clear, however, that by the understanding of the parties the defendant was not to be liable even for nominal damages. The plaintiff undertook not only to pay off the notes, but also, at least impliedly, to save the defendant harmless from any liability he might suffer from their remaining outstanding. All courts would probably recognize the first promise, to pay the notes: only the more liberal would recognize the second, to save harmless; as, by giving the defendant an action to recoup any loss he might suffer, the deed would in effect be negatived in so far as this particular incumbrance was concerned. *Roberts v. Greig*, 62 Pac. Rep. 574 (Col.). This more liberal view, however, seems preferable, as it gives the intended effect to the transaction. It is not open to the objection that the terms of the deed are thereby made uncertain, as they and liability under them are admitted to the fullest extent. The promise to save harmless merely gives the defendant a right to recoup any loss he suffers through the breach of his covenant. In the principal case had such an implied promise been recognized, the court could have allowed it as a complete defence, to prevent circuitry of action, and thus arrived at their result without making an exception — which in truth they must be regarded as having made — to the parol evidence rule.

CONSTRUCTIVE SEVERANCE OF FIXTURES. — A recent case is interesting because it differs from the trend of modern authority as to the nature of fixtures. The subject of fixtures has always caused much confusion in the law, and this confusion the principal case in no way tends to clear up. The owner of a greenhouse and the land on which it stood sold the greenhouse and at the same time leased the land to the vendees. The sale was by parol and consequently not recorded. Subsequently the vendor mortgaged the land to the plaintiff, who had no notice of the sale. The court held that, on foreclosure, the mortgagee was not entitled to the greenhouse. *Royce v. Latshaw*, 62 Pac. Rep. 627 (Col.).

This result is upheld by a few decisions: *Robertson v. Corsett*, 39 Mich. 777; *Fifield v. Maine Central R. R.*, 62 Me. 77. The majority of the courts, however, hold that such a constructive severance, while good between the parties themselves, is not effectual against a subsequent mortgagee without notice. *Joliet Bank v. Adam*, 138 Ill. 483. As a matter of strict principle, the latter view seems preferable. It is a rule of law that whatever is attached to land becomes a part of the realty, and goes to the owner of the land. So when an article of personalty is attached to land, its nature changes, and it becomes a part of the freehold. But

for reasons of policy, — as to encourage tenants to make the best use of their leaseholds, — the law allows parties by contract or custom to vary this rule to a certain extent. Contract and custom, however, cannot change the nature of the articles; and while the contract may, as between the parties themselves, allow them to treat an article as personalty, yet, unless it be actually severed, it remains realty. *Prescott v. Wells-Fargo Co.*, 3 Nev. 91. — These considerations are well brought out by the principal case. After the sale of the greenhouse, the vendee acquired a contract right in the nature of a profit, that is to say, a right to go upon the land and sever and remove the greenhouse. Its nature, however, was not changed by the sale, and it remained realty as before. As the formalities necessary to a sale of real estate were not complied with, it would seem that title had not passed. Moreover, there is a strong objection to the principal case upon grounds of policy. It is the purpose of the law to have the true title to property appear upon the public records. If the sale of the greenhouse had been made by deed and not recorded, the law would allow a subsequent mortgagee to prevail. It seems, then, against the spirit of the recording acts to allow parties to avoid them by a parol sale; especially where, as in the principal case, it operates to the detriment of innocent third parties who have advanced their money upon the faith of the public records. *Powers v. Dennison*, 30 Vt. 752.

JURISDICTION QUASI IN REM. — The case of *Pennoyer v. Neff*, 95 U. S. 714, has settled definitely, if indeed it could ever have been doubted, that a personal judgment against a defendant, who is neither domiciled nor served within the jurisdiction, is invalid. While it is true, then, that on such a judgment the defendant's property, even within the state, cannot be levied on, there are nevertheless certain ways in which such property can be dealt with by the state, although the owner is domiciled elsewhere. The state may take such property by the exercise of eminent domain; it may, if necessary, sell it for the payment of taxes; and it may equally well provide methods of having the rights to it judicially determined by its courts of law. Judicial proceedings, however, require that the property should in some manner be brought either actually or constructively before the court for adjudication, and that parties interested be given a fair chance to be heard.

A question as to what constitutes a fulfilment of the former of these requisites arose in a recent decision in Ohio, where a wife, having been deserted by her husband, brought suit to have a certain amount of alimony made a charge on her husband's property within the jurisdiction. The husband being a non-resident, service was made by publication, and a preliminary injunction was granted restraining him from disposing of the property, but no seizure or attachment took place. The court, however, proceeded and ultimately made a decree in favor of the plaintiff, charging the alimony on the defendant's property. *Benner v. Benner*, 58 N. E. Rep. 569. Now, although it is generally recognized that jurisdiction for divorce exists, if the plaintiff is domiciled within the jurisdiction, though there be no personal service on the defendant, yet it is well settled that no valid judgment for alimony can be given without having the defendant personally within the power of the court. *Rigney v. Rigney*, 127 N. Y. 408; *Lytle v. Lytle*, 48 Ind. 200. The court in the principal

case seemed to admit this, and allowed the action as a proceeding *quasi in rem*, relying on the preliminary injunction as being sufficient to bring the property within its control, so as to deal with it judicially. This, however, seems hardly sound. An injunction assumes for its validity personal jurisdiction over the defendant himself; without that, it is a mere nullity. The object of seizure in the ordinary case is not merely to inform the owner of the property of the proceedings which are going on, but to give the court jurisdiction by bringing the property within its control. While it would, perhaps, be difficult to define just what steps are necessary for this purpose, it seems impossible to regard a void order as a sufficient taking charge of the property. Further, it cannot be contended that the fact that the petition expressly asks relief as to the land in question will of itself operate to bring the defendant's title to that land before the court; for such reasoning would render service on a garnishee unnecessary in any case. We have then simply a case where neither the property, nor the defendant, nor any one owning an interest in the property, are before the court. The mere assertion of control over property cannot actually give control any more than the mere assertion of jurisdiction over the person of the defendant will give validity to a personal judgment against him.

LIABILITY OF CORPORATIONS ON CONTRACTS OF THEIR PROMOTERS. — The English doctrine as to a promoter's contract treats that contract as existing between the promoter in his individual capacity and the third party, the corporation in whose behalf and in whose name the contract is made being unable to adopt, ratify, or confirm the transaction. *In re Northumberland Hotel Co.*, 33 Ch. D. 16. Accordingly a recent English decision holds that a company is not bound by a contract made in its behalf before incorporation, even though after incorporation it had expressly adopted the agreement. *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, 17 Times L. R. 117. The English doctrine is based on the established rule of law that acts done in behalf of a non-existent principal cannot afterwards be ratified. Consequently, it is said that, as a corporation does not legally exist until it is incorporated, it cannot ratify any act done in its behalf prior to that time. On technical grounds it is impossible to criticize the English doctrine, for a ratification relating back to the time when there was no principal seems an absurdity. Practically, however, the result reached in many cases is undesirable, and the courts in some jurisdictions in this country have been inclined to look behind the corporate entity and at the real principals, who were existing at least as a potential corporation at the time the contract was made. Accordingly a ratification sometimes has been allowed. *Whitney v. Wyman*, 101 U. S. 392; *Oaks v. Cattaraugus Water Co.*, 143 N. Y. 430; see 8 HARVARD LAW REVIEW, 357. However, the weight of authority is *contra* to such a view. Alger on Promoters, § 199. The difficulty with the doctrine of these cases, as expressed in *Oaks v. Cattaraugus Water Co.*, *supra*, is that it does violence to the established principles of ratification. A third doctrine has consequently arisen in this country, and represents perhaps the prevailing American view. It holds that though a corporation cannot ratify it may confirm its promoter's contracts by what is called adoption or acceptance — the theory being based on the

conception that the original contract is in the nature of a continuing proposal, which, if not withdrawn, the corporation on its organization may accept. *Alger on Promoters*, § 202; *Pratt v. Oshkosh Match Co.*, 89 Wis. 406. It is said that there can be no difference between its making a contract by accepting or adopting an agreement originally made in advance for it and its making an entirely new contract; the adoption or acceptance, though in its nature a ratification, differing in its legal effect in that the contract dates from the time of the adoption, and not from the time of the original transaction. *McArthur v. Times Printing Co.*, 48 Minn. 319. This doctrine, it would seem, is defensible on principle, as well as on practical grounds, though it will only cover that class of cases where the facts may rationally be construed as a proposal. In the principal case it does not appear from the brief report whether the facts could be so construed. The decision, however, is treated as governed by *In re Northumberland Hotel Co.*, *supra*, where the promoter acted expressly "as trustee on behalf of an intended company," and the third party intended to bind the company. Under such circumstances, where the parties who make the original contract intend that the corporation when formed shall become or have an opportunity of becoming a party to it, it does not seem unreasonable to treat that contract as constituting or including an offer open to the corporation to accept on its coming into existence.

BREACH AFTER PART PERFORMANCE OF INSTALMENT CONTRACTS.—There is much confusion in the law as to whether or not in an instalment contract a failure of performance with respect to one instalment justifies an abandonment of the whole agreement. In England, though the authorities are irreconcilable, there is a general tendency to maintain the contract, while the American decisions, on the other hand, incline toward the doctrine of *Norrington v. Wright*, 115 U. S. 188, allowing a rescission. In a contract to deliver wood in instalments, payment to be made on delivery, the Supreme Court of Michigan, after reviewing the authorities, decided that a refusal to pay for the third instalment was not such a breach as to excuse the defendant from making further deliveries. *West v. Bechtel*, 84 N. W. Rep. 69. The decision is put on the ground that under the circumstances the plaintiff's refusal to pay did not evince an intention no longer to be bound by the contract. The English decisions where non-payment is the breach are relied on, and the rule of *Mersey Steel Co. v. Naylor*, 9 App. Cas. 434, is adopted.

The court in the principal case evidently distinguishes a breach by non-payment from a breach by non-delivery, *Norrington v. Wright*, *supra*, being quoted as not involving the exact point at issue. On principle, it is difficult to discover any validity in the distinction. It is true that non-delivery may be and often is a breach *in limine*, while non-payment, owing to its very nature, must always be a breach after part performance. In divisible contracts, however, the materiality of the breach, as affecting the main object of the transaction, should not greatly differ whether made at the outset or after part performance. Although the parties cannot always be put *in statu quo*, they may at least be placed in substantially as good a position. If, then, we adopt the doctrine of *Norrington v. Wright*, *supra*, where the breach was non-delivery after a part of the first instalment had been accepted, it seems difficult to sup-

port the principal case. If there has been a wrongful failure of performance the question of intention should be immaterial. Once the contract has been substantially broken, it does not help matters that the wrongdoer has the best of intentions for the future. Though this doctrine goes somewhat farther than the English decisions, and has been repudiated in New Jersey, *Gerli v. Poidebard Silk Mfg. Co.*, 31 Atl. Rep. 401, it seems sound on principle. See 9 HARVARD LAW REVIEW, 148. As to exactly what constitutes a material breach no definite rule can be laid down. It is purely a matter of judicial opinion. But it certainly would seem that the materiality of the breach should in no way be measured by the intention of the wrongdoer. Otherwise an instalment contract becomes perverted into an agreement to engage in a succession of lawsuits for such damages as the vendor may be able to recover, as a substitute for what he expressly bargained. Unless the wrongdoer can plead a defence for his default, according to sound business principles he should not be allowed to rely on his intention in case of the other party's failure to perform.

DEATHS CAUSED BY A COMMON DISASTER. — Where several perish in the same disaster, the common law, differing from other legal systems, has always refused to raise any presumption of survivorship. Not only has it refused to presume that a particular one survived, but it has also refused to presume that death occurred at the same time. *Wing v. Anggrave*, 8 H. L. C. 183. Where, however, the distribution of property is in question, the heirs-at-law are favored, and no one is allowed to claim without proof rights to property which are based on survivorship. Accordingly, the property is distributed as if death had occurred at the same moment. But this is only a rule of distribution and not a presumption of fact. *Newell v. Nichols*, 75 N. Y. 78.

In a recent case, the court seems to have overlooked this distinction between a presumption and a rule of distribution. A Fraternal Benefit Association had, by a death benefit certificate, promised to pay a sum of money to the wife of an assured member upon his death, and "in case she died before" her husband, then to the assured's heirs. Both husband and wife lost their lives in a fire, and there was nothing to show which died first. Upon a bill of interpleader by the association, the court held that the matter must be treated as if both had died at the same time, and, as the benefit had never vested in the wife, it should go to the assured's heirs. *Balder v. Middeke*, 5 Chicago Law Journal (N. S.), 325.

It will, however, be recognized that the court was not engaged in distributing the estate of a deceased person, but in the interpretation of a contract. The rule of distribution which favors the heir therefore can here have no application, and the common law neither favors nor hinders any one by a presumption. Moreover, as the question arises on a bill of interpleader, there is no burden of proof upon either one as against the other except such as the contract itself imposes. But there is clearly a difference between the rights of the parties under the contract. The claimants are called upon by the interpleader bill to state their causes of action to the court, and, to do this, each must frame a declaration against the company containing all the allegations essential to establish his right. This he must support by affidavits and by evidence if necessary. The promise to pay the widow is limited by a condition which is

clearly expressed as subsequent in form, whereas the right of the heirs is contingent upon a condition precedent. *Cowman v. Rogers*, 73 Md. 403. This is the natural and almost necessary construction of the contract, although, in a similar case, the Massachusetts court took a different view. *Fuller v. Linzee*, 135 Mass. 468. It will be seen that the heirs cannot state a claim without alleging the death of the beneficiary in the lifetime of the assured, or, at least, her death at the same time. This claim they cannot substantiate. The wife's representatives, however, state a valid *prima facie* claim by alleging merely the death of the assured. Consequently the decision of the court favoring the heirs' claim seems unjustifiable.

THE RIGHTS OF TRUSTEES TO INDEMNITY. — Where one person at the request of another undertakes a trust for that other's benefit, he has generally been held entitled to be indemnified by the *cestui que trust* personally, where the trust fund was insufficient, for any expenses connected with the execution of the trust. *Hemming v. Maddock*, L. R. 7 Ch. 395; *Grissell v. Brestowe*, L. R. 4 C. P. 36. The question whether the mere trust relation imposes the same liability on the beneficial owner independently of contract was for the first time presented in an important case lately decided by the Privy Council. *Hardoon v. Belilios*, 83 L. T. Rep. 573. A firm acquired stock in a bank, and had it registered in the name of the plaintiff, one of its clerks, he executing and delivering to the firm a blank transfer. This transfer came into the hands of one Coxon, who pledged it to the defendants, and on the settlement of accounts between Coxon and the defendants the latter became the beneficial owners of the stock. Later the plaintiff applied to the defendants to accept a transfer of the stock on the bank's books, but this the defendants refused. On the bank subsequently going into liquidation the plaintiff was placed on the list of contributories, and sued for calls so paid by him. The court held the defendant liable on the express ground that a person *sui juris* beneficially entitled to shares which he cannot disclaim, is bound, in a court of equity, to indemnify the trustee against calls.

On the facts of the principal case the result reached may be desirable, but it is difficult to feel the certainty of the court as to its obvious correctness. Lord Lindley professed to find the rule imposing liability under the circumstances of the principal case settled by a long line of decisions extending from *Balsh v. Hyham*, 2 P. Wms. 453, to *Hughes-Hallet v. Indian Gold Mines Co.*, 22 Ch. D. 561. In all these cases, however, the parties either stood in the relation of vendor and purchaser, or there was a contract between them, or a request by the defendant for the plaintiff to become trustee. These facts Lord Lindley stated were immaterial, but it was on these facts that the counsel for the plaintiff in all the cases relied, and the strongest expressions in favor of the principal case consist of loose statements broader than the matter there under consideration required. Moreover, the great authority of Lord Blackburn points squarely the other way. *Fraser v. Murdoch*, 6 App. Cas. 855. Hitherto, as far as actual decisions went, the trust relation could safely be regarded as unilateral, the trustee alone being under any obligation: all his rights against the *cestui que trust* arising separately — out of *quasi-contract* for a benefit conferred, or because of a contract of in-

demnity readily implied from a request to act as trustee. It is difficult to contend that a person merely by becoming a beneficial owner thereby subjects himself to certain duties to the legal owner. Being a holder of the beneficial interest does not always necessitate incurring the liabilities of legal ownership, for one can take an under lease for one day less than the original term of a lease, and not be liable on its covenants, though practically the entire beneficial interest has passed. Further there is no strong reason of convenience against the view that the trust relation is unilateral, because a person becoming trustee must be taken to know that liability is often consequential on legal ownership, and accordingly he should safeguard himself by some provision for indemnity. It would scarcely be contended that the legal owner in this case could by a bill in equity have forced the legal title on the defendant. The latter could well say that he did not buy that, and does not want to have anything to do with it. Yet that is practically the result of the principal case. By it an equitable owner is placed effectively in the same situation as a legal owner, for on its principle the liquidator could enforce any legal liability of the trustee by an equitable execution against the *cestui que trust*. It would be interesting to see whether the court in an analogous case in which the *trust res* consisted of land would similarly throw the burden on the beneficial owner. To do so would be in violation of the principles governing trusts of land, and would compel the court to disregard a decision by Lord Cottenham holding that an equitable mortgagee of a lease cannot be forced to take an assignment of the lease, or be held liable on its covenants. *Moore v. Greg*, 2 Phillips, 717. Yet it would be difficult for the court to find a satisfactory distinction. The case, in short, seems but another illustration of the tendency at times manifested by even the most conservative tribunals *judicium dare* and not *judicium dicere*.

RECENT CASES.

ADMIRALTY—MUNICIPAL CORPORATIONS—TORTS OF PUBLIC AGENTS.—A city fire-boat on the way to a fire, through the negligence of those in charge, ran into and injured another vessel. *Held*, that the common law rule, holding that the city is not liable for the negligence of its servants while engaged in a public service, is inapplicable in admiralty. *Workman v. New York*, 21 Sup. Ct. Rep. 212. See NOTES, 14 HARV. LAW REV. 450.

BANKRUPTCY—GENERAL ASSIGNMENT—RIGHTS OF CREDITORS.—A debtor voluntarily conveyed property to a trustee for the benefit of creditors, securing by the deed a fraudulent debt to his wife. The plaintiff brings a bill to have the deed set aside as to voluntary debts. *Held*, that the plaintiff may attack a debt secured by the deed at the same time that he asserts his own rights as a beneficiary. *Runkle's Admin. v. Runkle*, 37 S. E. Rep. 279 (Va.).

In general, a grantee under a deed cannot accept its benefits, and reject any burdens which it imposes. *Vickerie v. Buswell*, 13 Me. 289. Accordingly it has been held that a creditor, affirming part of a voluntary assignment by claiming under it, cannot disaffirm the rest. *Pratt v. Adams*, 7 Paige, 615, 641; *Swanson v. Tarkington*, 7 Heisk. 612. The general rule, however, seems to be improperly applied to these cases, for the attacking creditor does accept the deed *in toto* as far as it is legal, and is not rejecting any legal burden. He is merely endeavoring to strike out improper provisions from the deed. In this view of the matter, and considering the better protection afforded to creditors thereby, the result reached in the principal case seems

preferable. It is also supported by some authority. *Starr v. Dugan*, 22 Md. 58; *Lockhard v. Brodie*, 1 Tenn. Ch. 384, 388 (*semble*).

BANKRUPTCY — PROVABLE CLAIMS — FUTURE RENT. — *Held*, that under the Bankruptcy Act of 1898 rent to accrue after the bankruptcy of a lessee is not provable against his estate, not being a fixed liability absolutely owing at the time of the filing of the petition, or such an unliquidated claim as may be liquidated and proved under sec. 63 b. *In re Mabler*, 3 N. B. N. Rep. 39 (Dist. Ct., Mich.). See NOTES, 14 HARV. LAW REV. 457.

BANKRUPTCY — STATE INSOLVENCY LAWS — SUSPENSION BY FEDERAL ACT. — A debtor made a general assignment for the benefit of creditors under a state statute which merely regulated such assignments, and made no provision for a discharge of the debtor. Subsequently a creditor sought to garnishee the goods in the hands of the assignee, alleging that the state statute was suspended by the Federal Act. *Held*, that the statute was not so suspended. *Patty-Joiner v. Cummins*, 59 S. W. Rep. 297 (Tex., Civ. App.).

State insolvency laws are suspended upon the passage of a national bankruptcy law, but a local statute which is not in conflict with the Federal law remains in force. That a statute has for its object some of the results brought about by a bankruptcy law is not a fatal objection. It has been held that a poor debtor's law relieving a debtor from arrest upon the surrender of his goods for the benefit of his creditors is not suspended. See *Stockwell v. Silloway*, 105 Mass. 517. Moreover a general assignment for the benefit of creditors is perfectly legal at common law; and the fact that such an assignment is made pursuant to a statute which merely regulates the transaction should not render it void. Any general assignment is an act of bankruptcy, and the trustee may claim the property of the assignee. *In Re Gutwillig*, 92 Fed. Rep. 337. Until, however, it is attacked in bankruptcy proceedings, the assignment should stand. The present case, therefore, is correct on principle and authority. *Mayer v. Hellman*, 91 U. S. 496.

BILLS AND NOTES — SIGNATURE GIVEN UNDER MISTAKE AS TO CONTENTS. — The plaintiff prepared a note containing a different contract from that which the defendant had previously agreed to sign, and presented it to the defendant, who negligently signed it without reading, supposing it to contain the contract agreed upon. *Held*, that no actual fraud was shown, and that the defendant, being the victim of his own negligence, was liable on the note. *Walton Guano Co. v. Copelan*, 37 S. E. Rep. 411 (Ga.).

When one is induced to sign a note by a fraudulent misrepresentation of the payee as to its nature or contents, his liability to a holder in due course depends on the question of negligence. *Foster v. MacKinnon*, L. R. 4 C. P. 704; 14 HARV. LAW REV. 463. In such cases the defendant never in fact made the contract in question, since, as the other party well knew, he never intended to do so; but in case of negligence he is estopped to deny his liability as against one who innocently relied on his signature. See 11 HARV. LAW REV. 472. In the principal case, whether or not the plaintiff intended to induce the defendant's mistake, it is tolerably clear that the plaintiff was aware of it at the time of the signing. This would seem quite enough to make his conduct fraudulent. See BIGELOW ON FRAUD, 11, 12. But that question is not here important. The defence is not fraud, but "never contracted," and there can be no estoppel, since the plaintiff, knowing the mistake, obviously had no right to rely on the defendant's signature. The decision seems therefore erroneous.

CARRIERS — NEGLIGENCE — RELATION OF CARRIER AND PASSENGER. — The plaintiff, a passenger on defendant's train, got off at a station in the night, intending to remain there till morning. Almost immediately afterwards she was injured through defendant's negligence in keeping the station. *Held*, that even if she would have had no right to remain till daylight, she is not barred by her intention to do so. *Chicago, etc. Ry. Co. v. Wood*, 104 Fed. Rep. 663 (C. C. A., Eighth Circ.).

A railroad company is liable for injuries resulting to its passengers from its negligent failure to keep its station properly. *Watson v. Oxanna Land Co.*, 92 Ala. 320; *St. Louis S. W. Ry. Co. v. Griffith*, 12 Tex. Civ. App. 631. Ordinarily the liability continues till passengers have left the premises. *Gulf, etc. Ry. Co. v. Glenk*, 9 Tex. Civ. App. 599; *Crass v. Lake Shore, etc. Ry. Co.*, 69 Mich. 363. But if the traveller remains in the station an unreasonably long time, the railroad's liability to him as pas-

senger then ceases. *Davis v. Houston etc. R. R. Co.*, 59 S. W. Rep. 844. Since, however, the plaintiff in the present case had as yet done nothing not perfectly justifiable, she was clearly in possession of all her rights as passenger, and the decision thus is perfectly sound. Her bare intention to do an act in the future which would deprive her of the rights of a passenger cannot affect the liability of the defendant.

CONFLICT OF LAWS — JURISDICTION QUASI IN REM. — A wife brought suit to have alimony allowed her out of certain property of her husband, who had deserted her, and become domiciled in another state. A preliminary injunction was granted restraining defendant from disposing of the property in question. *Held*, that the court thereby, without seizure or attachment, acquired jurisdiction to create a charge on the property in favor of the plaintiff. *Benner v. Benner*, 58 N. E. Rep. 569 (Ohio). See NOTES, p. 535.

CONSTITUTIONAL LAW — FIFTH AMENDMENT — RIPARIAN RIGHTS. — A government pier, built opposite to the plaintiff's riparian land for the purpose of facilitating navigation, destroyed his access to the stream. *Held*, that this was not a taking of property within the Fifth Amendment. *Scranton v. Wheeler*, 21 Sup. Ct. Rep. 48. See NOTES, 14 HARV. LAW REV. 451.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — ORIGINAL PACKAGE. — The plaintiff in error imported into Tennessee a number of paper packages of cigarettes, each package containing ten cigarettes. These packages were transported loosely, in an open basket belonging to the carrier. *Held*, that, on the sale of one of these packages in Tennessee, the plaintiff in error was properly convicted, under a Tennessee statute, which forbade all sales of cigarettes. *Austin v. Tennessee*, 21 Sup. Ct. Rep. 132.

It may well be doubted whether the true view is not that the commerce clause of the Constitution of the United States should never interfere with a state's police regulations. 2 Thayer's Cases on Constitutional Law, 2191. The Supreme Court of the United States has decided, however, that, in the absence of action by Congress, a state cannot by a general prohibitory statute constitutionally prevent goods imported from another state, from being sold by the importer in the original package. *Leisy v. Hardin*, 135 U. S. 100. This doctrine was considerably qualified by the decision that it does not apply to a state statute forbidding sales of oleomargarine made in imitation of butter. *Plumley v. Mass.*, 155 U. S. 461; 8 HARV. LAW REV. 353. It has nevertheless been reasserted against a general prohibitory law. *Schollenberger v. Pennsylvania*, 171 U. S. 1. The principal case, however, greatly limits the importance of the general doctrine even in such cases. The court goes on the ground that the transaction was a palpable subterfuge, and that the package of cigarettes was not an original package, within the constitutional meaning of that term. The result of this would seem to be that the original package doctrine does not apply to packages smaller than the customary unit of shipment, and, therefore, does not in general allow sales at retail. Such a qualification seems hardly logical, and not easy of application, but, nevertheless, is scarcely to be regretted, in view of the questionable soundness of the whole doctrine.

CONSTITUTIONAL LAW — JURISDICTION — INTEREST OF PARTIES. — *Held*, that the Massachusetts Land Registration Act of 1808 is not unconstitutional as depriving of property without due process. *Tyler v. Judges of the Court of Registration*, 175 Mass. 71.

On writ of error to the Supreme Court of the United States *held*, that the plaintiff in error has not shown that he was injured, and that, therefore, he has no sufficient interest to give the court jurisdiction. *Tyler v. Judges*, 21 Sup. Ct. Rep. 206. See NOTES, p. 529.

CONTRACTS — BREACH AS TO ONE INSTALMENT — RIGHT TO RESCIND. — Under an instalment contract, the plaintiff refused to pay for the third instalment on delivery as stipulated. *Held*, that there is nothing in plaintiff's conduct to indicate a design not to perform in the future, and that therefore the defendant is not entitled to repudiate the entire contract. *West v. Bechtel*, 84 N. W. Rep. 69 (Mich.). See NOTES, p. 537.

CONTRACTS — COVENANTS — DEFENCE OF FRAUD. — *Held*, that a release under seal cannot be impeached in an action at law on the ground that the plaintiff was induced

to execute it by fraud. *Hill v. Northern Pacific Ry. Co.*, 104 Fed. Rep. 754 (Circ. Ct., Wash.).

Fraud was at common law no defence to an action at law on a specialty, unless it affected the execution so that it could be shown under *non est factum*. See 9 HARV. LAW REV. 51. This rule has been generally changed by statute or by judicial decision, *Partridge v. Messer*, 14 Gray. 180, so that resort to equity for relief is no longer necessary, but it is still law in the Federal courts. *George v. Tate*, 102 U. S. 564. The same principle is clearly applicable where, instead of attempting to defeat an action on a specialty by showing fraud, the plaintiff is trying, as in the present case, to invalidate a release under seal. It has been held, however, that the common law was more liberal in allowing the defence in such cases, and that accordingly the Federal courts would do so. *Wagner v. National Life Ins. Co.*, 90 Fed. Rep. 395. The court in the principal case rightly refuses to follow this decision, which is without logical basis, and, although apparently having some support, is not established on authority. *Connor v. Dundee Works*, 50 N. J. 257.

CONTRACTS — NON-PERFORMANCE AS A DEFENCE — IMPLIED CONDITIONS. — X gave his note for \$1000 to Y in consideration of Y's promise to discharge certain claims of third persons against X, and pay X the remainder of the \$1000. No time was set for performance by Y, but though a reasonable time had elapsed, Y never paid the claims. Held, that the two promises were independent, and Y's failure to perform his promise is no defence to an action on the note. *Tronson v. Colby Univ.*, 84 N. W. Rep. 474 (N. D.).

The doctrine making non-performance by the plaintiff a defence in an action on a contract was originally worked out through the formula of implied conditions, the question being therefore treated as one of construction. Accordingly much stress was laid on such circumstances as the fixing of the time for performance. *Pordage v. Cole*, 1 Will. Saund. 319 l, and note ib. 320 a. In several cases also, some of them not yet overruled, the courts refused to apply the doctrine to a suit on a note or bond. *Spiller v. Westlake*, 2 B. & Ad. 155. See LANGDELL, SUM. CONT. § 117. The American authorities are mainly *contra*. *Fort Payne, etc. Co. v. Webster*, 163 Mass. 134. Though the language of implied conditions is still generally employed, the modern decisions, especially in this country, have made the defence turn entirely on the materiality of the breach. *Norrington v. Wright*, 115 U. S. 188. The true ground for these cases seems to be the manifest injustice of allowing one who has himself committed a material breach to compel the other party to perform. See 14 HARV. LAW REV. 424. The same principle applies to cases, which the old theory will not explain, where a breach by the plaintiff, though not yet committed, is reasonably certain to occur. *James v. Burchell*, 82 N. Y. 108. The reasons for the decision in the principal case are not distinctly stated, but the result is unfortunate and irreconcilable with the weight of American authority.

CONTRACTS — WARRANTY — DAMAGES FROM LOSS OF CROP. — Seeds sold with a warranty that they would grow were planted, but produced no crop. Held, that the measure of damages is the price paid, the expense of planting, etc., and a fair rent of the land, less what it could have been rented for after the failure of crop was discovered, and that the value of the crop that should have been raised cannot be considered. *Reiger v. Worth Co.*, 37 S. E. Rep. 217 (N. C.).

If the result of such a breach of warranty is a crop deficient in quality only, the damages are of course the difference in the value of the crop. *Wagstaff v. Shorthorn Dairy Co.*, 1 Cab. & E. 324. Where the deficiency is in both quality and quantity, or in quantity alone, the same rule is applied. *Passenger v. Thorburn*, 35 Barb. 17; *Flick v. Wetherbee*, 20 Wis. 392. It is clearly an objection to these latter cases that damages based on deficiencies in quantity are speculative in their nature. This, however, seems on the whole not of sufficient importance to warrant denying redress to one who has undoubtedly been damaged. There appears to be no valid distinction between these cases and cases like the present. The weight of authority where no crop at all is produced is nevertheless in accord with that decision in holding such damages too speculative. *Ferris v. Comstock Co.*, 33 Conn. 513; *Butler v. Moore*, 68 Ga. 780. *Contra*, *Page v. Pavey*, 8 C. & P. 769.

CORPORATIONS — ABUSE OF FRANCHISE — QUO WARRANTO PROCEEDINGS. — The trustees of a college leased it to a man who sold degrees, signed by the trustees, without regard to the merits of or the work performed by those on whom they were

conferred. *Held*, that this was such an abuse of its corporate franchise as to justify a judgment ousting the college of its corporate franchise. *State v. Mt. Hope College Co.*, 58 N. E. Rep. 799. See NOTES, p. 532.

CORPORATIONS — CONFIRMATION OF PROMOTER'S CONTRACT. — One acting in behalf of an intended company made a contract with the plaintiff, and the company after its incorporation adopted the agreement. *Held*, that the company is not bound by the agreement, a corporation being unable to adopt, ratify, or confirm a contract made in its behalf before incorporation. *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, 17 Times L. R. 117. See NOTES, p. 536.

CORPORATIONS — SALE OF ASSETS — ASSUMPTION OF LIABILITIES. — By statutory authority one corporation purchased the property and franchises of another corporation, the deed of sale containing a covenant by the buyer to assume and discharge all obligations and liabilities of the seller. *Held*, that the purchaser was not liable to the plaintiff for an injury to the plaintiff's property committed by the seller. *Capital Traction Co. v. Offutt*, 29 Wash. Law Rep. 18. See NOTES, p. 530.

CRIMINAL LAW — RECEIVING STOLEN PROPERTY — HUSBAND AND WIFE. — The defendant's husband brought home property stolen by him, the defendant knowing that the property had been stolen, and intending to enjoy the benefits of the theft. *Held*, that the jury being satisfied that she was not coerced, the wife may be convicted of receiving stolen property. *People v. Hartwell*, 55 N. Y. App. Div. 234.

Formerly a person receiving property knowing it to have been stolen was guilty as accessory after the fact, and although modern statutes have made the act a substantive crime, the true nature of the offence remains unchanged. WHARTON, CRIM. LAW, 10 ed § 982. A wife cannot be convicted as accessory after the fact to a crime committed by her husband. *Regina v. Manning*, 2 C. & K. 887, 904. 4 BL. COM. 39. Hence, in the absence of statutory changes in the wife's status in this respect, it must follow that she cannot be convicted of receiving stolen property from her husband. *Regina v. Brooks*, Dears. 184. The principal case may have been influenced by the rule in New York that husband and wife may be jointly convicted of this crime. *Goldstein v. People*, 82 N. Y. 231. Even if that rule be correct, and there is authority *contra*, *Regina v. Matthews*, 4 Cox, C. C. 214, the principal case should not be affected thereby, since the fact that husband and wife may jointly commit a crime does not affect the wife's inability to be an accessory after the fact to her husband's crime. This rests on totally independent considerations of policy.

EQUITY — SPECIFIC PERFORMANCE — CONTRACT TO DEVISE. — The plaintiffs out of benevolence furnished support to an apparently destitute woman. At their request, which was induced by a suspicion that she was concealing some property, she executed a will in their favor, but subsequently destroyed it without their knowledge, and executed another in favor of third persons. The plaintiffs continued to support her until her death, when it appeared that she had a considerable amount of personal property. *Held*, that the obligation of the testatrix to devise her property to the plaintiffs was specifically enforceable in equity against the executor and devisees of the second will. *Anderson v. Eggers*, 47 Atl. Rep. 727 (N. J., Ch.).

The principal reason given for the decision seems to be an application of the rule of estoppel to representations as to future conduct. The only authority for this doctrine has its origin in an elaborate English *dictum*, contradicted by a later decision of the House of Lords. *Hammersley v. Biel*, 12 Cl. & Fin. 45, 88; *Jorden v. Money*, 5 H. L. C. 185, 214. But the facts of the principal case apparently show a valid contract, according to the intent of the parties, completed when support was actually furnished up to the death of the testatrix. A contract to devise real estate is almost everywhere, so far as possible, specifically enforceable after the promisor's death. *Johnson v. Hubbell*, 66 Am. Dec. 773, and note *ib.* 783. Strictly specific performance is of course impossible after the death, and before the death there is no breach; but the result is reached by a constructive trust. *Belman v. Overall*, 80 Ala. 451, 455. No authority has been found for the case where the promisor leaves only personal property. But a decree that the executor account to the promisee for all the property which shall be found to exist is clearly so much more adequate than a judgment awarding damages estimated by a jury, that the extension of the doctrine to such cases may well be approved.

EQUITY — SPECIFIC PERFORMANCE — MISTAKE. — Land was sold at auction, under printed conditions containing a description of the premises and a provision that there be compensation for misdescriptions. At the sale the auctioneer distinctly made verbal corrections in the printed descriptions, which the purchaser did not hear. *Held*, that the purchaser cannot have specific performance with compensation for the misdescription. *In re Hare & O'More's Contract*, [1901] 1 Ch. 93.

Such verbal statements by the auctioneer would probably be, under the parol evidence rule, no defence to an action on this contract. *Shelton v. Livius*, 2 C. & J. 411. The fact, however, that there is a binding contract is not necessarily decisive as to specific performance. This remedy is largely discretionary with equity, and will not be granted where the enforcement of the contract is inequitable, because of fraud or mistake. The principal case is an instance of the application of this general rule. The buyer is trying to enforce a contract, different from that which the seller honestly and without fault supposed was being made; and there is therefore, both on principle and authority, such a case of mistake as to justify equity in refusing specific performance. *Manser v. Back*, 6 Hare, 443; *Malins v. Freeman*, 2 Keen, 25; *Quinn v. Routh*, 37 Conn. 16, 31.

EVIDENCE — BASTARDY PROCEEDINGS — EXHIBITION OF CHILD. — *Held*, that on a prosecution for bastardy, the exhibition to the jury of the child, under two years of age, for the purpose of showing its resemblance to defendant, was error. *State v. Harvey*, 84 N. W. Rep. 535 (Iowa).

It is frequently held that the child may be exhibited to the jury to show resemblance to the putative father. *Gaunt v. State*, 50 N. J. Law, 490; *contra*, *Clark v. Bradstreet*, 80 Me. 354. Undoubtedly, peculiarities of feature are often transmitted from parent to child, and where distinctive characteristics like differences in color appear, there seems good reason for allowing the exhibition. *Finnegan v. Dugan*, 95 Mass. 197; *Wartick v. White*, 76 N. C. 175. If the child is young, however, such evidence is ordinarily too uncertain to be of value. In bastardy proceedings, especially, the attitude of the jury is such that its admission is in general unfair and dangerous. The court in the principal case was bound by a previous decision allowing the exhibition of a child of two years. *State v. Smith*, 54 Iowa, 104. It could not therefore lay down a broader rule, but its decision is entirely sound in strictly limiting the previous case.

EVIDENCE — OPINION EVIDENCE — DYING DECLARATIONS. — Defendant relied on insanity as a defence to a prosecution for homicide. *Held*, that it was error to exclude the opinions of non-expert witnesses based on facts stated by them as to whether defendant was in his natural state of mind; but that there was no error in excluding deceased's dying declarations that he believed defendant was crazy and did not intend to kill him, since such declarations are mere statements of opinion. *State v. Wright*, 84 N. W. Rep. 541 (Iowa).

The better view, and that supported by the weight of authority, is that non-experts may state their opinion of a person's sanity when the facts upon which the opinions are based are known to the jury. *Connecticut Ins. Co. v. Lathrop*, 111 U. S. 612; *Jamison v. People*, 145 Ill. 357. The admission of the witnesses' opinions in the principal case was therefore proper. But dying declarations are competent only in so far as the statements therein could have been given in evidence by the deceased had he lived. 1 GREENL. EVID. 16th ed. § 159. His statement also would have been admissible only if accompanied by the facts upon which it was based. *Grubb v. State*, 117 Ind. 277. Since here the jury could not know these facts, the declaration was properly excluded. The decision in the principal case is therefore correct on both points, but the reasons for the distinction are not adequately indicated.

EVIDENCE — PRESUMPTIONS — BURDEN OF PROOF. — A death-benefit certificate provided that it should be paid to the assured's widow, "and in case she died before him," then to his heirs. The assured and his wife both died in a common disaster. *Held*, that the fund should go to the heirs. *Balder v. Middeke*, 5 Chic. L. J. N. S. 325. See NOTES, p. 538.

FEDERAL JURISDICTION — REMOVAL OF CAUSES — SUIT AGAINST ALIEN AND CITIZEN. — The circuit courts of the United States are given jurisdiction over suits between citizens of different states, or between citizens of a state and citizens or subjects of a foreign state. Suit was brought by a citizen of Washington against a West

Virginia corporation and a foreign corporation. *Held*, that the circuit court has jurisdiction. *Roberts v. Pacific, etc. Co. et al.*, 104 Fed. Rep. 577 (Circ. Ct., Wash.).

A foreign corporation is held to be an alien, and may remove a suit into the Federal courts. *Terry v. Imperial, etc. Co.*, 3 Dill. 408. It is equally well settled that a domestic corporation chartered by a state other than the plaintiff's has the same right. *Railway Co. v. Whitton*, 13 Wall. 270, 283. Accordingly had suit been brought against the two defendants separately there could be no question of the jurisdiction of the court. This might seem to be conclusive of the present case. *Strawbridge v. Curtiss*, 3 Cranch, 267. But it is contended that as the defendants when so joined do not come within the precise words of the statute, the circuit court cannot take jurisdiction. 1 *Dest. Fed. Proc.*, 9th ed., p. 472; Black Dill. Rem. Caus. §§ 68, 84; *Tracy v. Morel*, 88 Fed. Rep. 801 (*semble*). The only previous decision on the point, however, is in accord with the principal case, *Ballin v. Lehr*, 24 Fed. Rep. 193, and this position seems preferable. Admitting that the statute should be strictly construed, *Daugherty v. Western Union, etc. Co.*, 61 Fed. Rep. 138, no construction should be adopted which will produce absurd results. *Oates v. National Bank*, 100 U. S. 239, 244. Clearly the act was intended to cover such cases.

INSURANCE — REINSURANCE — RIGHTS OF POLICY HOLDER AGAINST REINSURER.

— By a contract of reinsurance, the reinsurer assumed all liability under outstanding policies, the contract providing, however, that it was to be effective only between the parties thereto, and that no policy holder should enforce it against the reinsurer, who was to pay only claims proved in an action against the reinsured. *Held*, that an action lies by a policy holder against the reinsurer immediately upon the destruction of the property. *Shoaf v. Palatine Ins. Co.*, 37 S. E. Rep. 451 (N. C.).

The ordinary reinsurance contract is a contract of indemnity between the reinsurer and the reinsured, and creates absolutely no relation between the former and the original policy holders. *Herckenrath v. American, etc. Ins. Co.*, 3 Barb. Ch. 63; *Goodrich & Hick's Appeal*, 109 Pa. St. 523. It is possible, of course, for the reinsurer to agree to pay the policy holders directly, who thereby, under the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, will get a right of action against the reinsurer. *Glen v. Hope Mutual L. Ins. Co.*, 56 N. Y. 379; *Johannes v. Phoenix Ins. Co.*, 66 Wis. 50. The doctrine of *Lawrence v. Fox*, *supra*, does not, however, create a right in favor of one who, though he would derive a benefit from the performance of a contract, is not in fact made the beneficiary of it. *Duruherr v. Rau*, 135 N. Y. 219. So far from being beneficiaries, the policy holders in the principal case were by the very terms of the contract excluded from all rights. Moreover, the decision would be indefensible, even if they were beneficiaries, because the plaintiff's claim not having been proved in an action against the reinsured, no breach of contract by the reinsurer could be shown.

MORTGAGE — ASSIGNMENT — RECONVEYANCE BY ASSIGNEE. — A mortgagor of a house put her solicitor in funds for the purpose of paying off the mortgage debt. The solicitor appropriated the money to his own use. Later he took a transfer of the mortgage debt and security to himself in his personal capacity, and in turn transferred the same to the defendant, who acted in good faith, paying value, but gave no notice to the mortgagor. *Held*, that the mortgagor may have a reconveyance. *Turner v. Smith*, 49 Weekly Rep. 186 (Ch. D.).

Where the mortgagor has no notice of the transfer of the mortgage debt, it is clear that any payments by the mortgagor to the mortgagee, whether made before or after the assignment, will be good against the innocent transferee for value. *Williams v. Sarrell*, 4 Ves. 389. Moreover, the assignee takes subject to any set-off the obligor may have against the obligee. *Norrish v. Marshall*, 5 Madd. 475, 481. For though the mortgage bond has not been delivered up, the payment to or set-off against the obligee gives rise to a defence to any action thereafter, whether brought by the obligee in his own right or by the assignee suing in his name. Obviously the result must be the same when payment is made to or a set-off exists against an assignee with the beneficial interest. An assignment is the grant of a power of attorney, and any defence which exists against an assignee who holds in his own right must be equally good against the obligee, for payment to or a set-off against such an attorney is in contemplation of law a payment to or set-off against the grantor of the power. Now in the principal case the moment the bond became the property of the solicitor, it belonged in equity to the mortgagor, she having a complete set-off against the present owner of the mortgage debt. In other words, when the bond came into the hands of the solicitor as purchaser, there was a good defence to any action founded on the obligation running

to the mortgagee. This defence existed when the transfer was made to the defendant, and hence as assignee he took subject to it. The debt was extinguished in equity and was no longer a subsisting charge upon the property; hence in granting a reconveyance to the mortgagor the principal case is perfectly sound.

PROPERTY — COVENANT AGAINST INCUMBRANCES — PAROL PROMISE TO SAVE HARMLESS. — Defendant conveyed land to the plaintiff with warranty against all incumbrances. At the time there were outstanding two notes against the defendant, which constituted a lien on the land. These notes the plaintiff undertook to pay off, and no mention of them was made in the deed. He failed to pay. The land was sold by foreclosure, and the plaintiff brought action on the covenant against incumbrances. *Held*, that the plaintiff's promise is a defence, its effect being, not to make an exception to the terms of the deed, but to show that, as between the parties, the incumbrance had been paid off, so that there was no breach. *Johnson v. Elmen*, 59 S. W. Rep. 253 (Tex., Sup. Ct.). See NOTES, p. 533.

PROPERTY — FIXTURES — CONSTRUCTIVE SEVERANCE. — The owner of a greenhouse and the land on which it stood sold the greenhouse and leased the land to the vendee. Subsequently she mortgaged the land to the plaintiff, who had no notice of the sale. *Held*, that on foreclosure the mortgagee was not entitled to the greenhouse. *Royce v. Latshaw*, 62 Pac. Rep. 627 (Colo.). See NOTES, p. 534.

PROPERTY — NUISANCE — RECOVERY BY LESSEE. — A lessee took property, knowing that it was affected by a private nuisance. *Held*, that damages are recoverable by the owner of the freehold only, and not by the lessee. *Bly v. Edison Electric Illuminating Co.*, 54 N. Y. App. Div. 427.

It is clear that where a lease is taken prior to the creation of a nuisance, the tenant may recover for injuries to his possessory interest. *Sherman v. Fall River Iron Works Co.*, 2 Allen, 524. The ground of the decision in the principal case is, that where a lease is taken with notice of a nuisance, it must be presumed that the parties had the nuisance in mind, and estimated the value of the premises incumbered by it. Accordingly the injury is to the rental value solely, and the lessor has the exclusive right to sue. This rule seems to be the settled law of New York. *Kernochan v. New York, etc. R. R. Co.*, 128 N. Y. 559. And yet it is admitted that in a proper case the tenant is entitled to an injunction. *Pach v. Geoffroy*, 67 Hun, 401. Therefore as the nuisance could have been thus abated at any time during the tenancy, it seems unfair to presume that the parties contemplated its continuance in fixing the rental value. Clearly the possessory interest of the lessee has actually been injured, and for this an action at law should be allowed, although it may be that by the terms of the contract between them the lessee cannot retain the damages against the lessor.

SURETYSHIP — CONTRIBUTION — DISCHARGE OF CO-SURETY. — A, B, C, and D were sureties on a joint and several note for \$4000. A, B, and C each paid \$1000 to the obligee. A and B were later compelled to pay D's share. D executed three notes to A, B, and C, each for one third of his share of the original debt, payable in one year. C refused to be bound by this transaction with D, who was hopelessly insolvent, and A now sues C for a moiety of C's third of D's share. *Held*, that A cannot recover anything against C. *Clark v. Danz*, 28 So. Rep. 960 (Ala.).

As among themselves each co-surety is a principal to the extent of his share of the joint and several debt, and the others are as to such share sureties, each for his proportionate amount. *Brogg v. Patterson*, 85 Ala. 233, 235. Hence, in the principal case, D became the debtor of A and B upon their paying his share of the joint debt, while C was a surety for one third of the amount. An action would lie immediately. Now the fair interpretation of the settlement entered into with D by A and B is that they bound themselves not to proceed against him, either directly or indirectly for one year. The effect of this is to discharge C, for if a creditor agrees to give time to his principal, the surety is excused, it being immaterial whether the act of the creditor would benefit or injure the surety. *Samuell v. Hewarth*, 3 Mer. 272. The decision in the principal case is therefore clearly sound. See also *Cummings v. May*, 91 Ala. 233, 239.

SURETYSHIP — INJURIES TO EMPLOYEES — CONTRACT OF INDEMNITY. — An insurance company contracted to indemnify an employer for all sums actually paid by him in satisfaction of judgments obtained against him by employees injured through his negligence. *Held*, that where the employer is bankrupt, the trustee in bankruptcy

by a bill in equity may compel the insurance company to pay the amount of a judgment directly to the injured employee. *Beacon Lamp Co. v. Travellers' Ins. Co.*, 47 Atl. Rep. 579 (N. J., Ch.).

The court treats this case as analogous to cases where the grantee of land assumes the mortgage debt, in which the grantee becomes in equity the principal debtor, and the grantor a surety only. *Klapworth v. Dressler*, 13 N. J. Eq. 62; *Keller v. Ashford*, 133 U. S. 610. In these cases, however, the promise to pay the debt to the mortgagee creates an equitable obligation running directly to him; while in the principal case the promise does not run to the employee, and here therefore his rights must be worked out through his employer. But to the latter the defendant is under no liability until the judgment debt has been paid. Accordingly, on principle, the trustee should first pay to the employee from the assets the proper percentage of his claim. Then he would be entitled to be reimbursed by the insurance company, and the amount thus obtained would form a new fund to be divided ratably. For any amount paid to the employee from this second fund, the insurance company must again reimburse the trustee, and this process would continue until the amount paid to the employee would be too small to be considered legally. Since the final result can be calculated in advance, the whole case may be settled in one decree. This rule has been followed in a similar case. *Royal Bank of Scotland v. Commercial Bank of Scotland*, 7 App. Cas. 366; *contra, Ex parte Waring*, 2 Glyn & J. 621. See AMES, CAS. ON SUR. p. 624, note 1; p. 631, note 1; 1 HARV. LAW REV. 326, 337.

SURETYSHIP—RELEASE OF PRINCIPAL OBTAINED BY FRAUD—LIABILITY OF SURETY.—At the maturity of a note on which the principal and surety were bound, the principal retired it by a new note on which the surety's name was forged. *Held*, that action would lie against the surety on the original note. *McIntyre v. McGregor*, 21 Canadian L. T. Rep. 25.

The result reached is clearly correct, and is in accord with the authorities. *West Phila. Nat. Bank v. Field*, 143 Pa. St. 473; *Allen v. Sharpe*, 37 11 d. 67. Such cases are generally supported by saying that payment in forced paper is not a valid payment, and that therefore the original debt remains in full force. *Bank v. Buchanan*, 87 Tenn. 32. On principle, however, the relief afforded to the plaintiff in such cases seems to rest on equitable considerations. The legal liability of the surety being terminated by the surrender or cancellation of the original instrument, equity will not allow him unjustly to take advantage of that fact to the detriment of the creditor. If, however, the surety has, in reliance on the legal extinguishment, in good faith changed his position, he will not be liable, since as between two persons having equal equities, one of whom must suffer, the one having the legal right will prevail. 4 HARV. LAW REV. 297. *Kirby v. Sandis*, 54 Iowa, 150; *contra, Lyndonville Nat. Bank v. Fletcher*, 68 Vt. 81. Since in the present case, the surety had not changed his position, he was properly held liable.

TORTS—ASSUMPTION OF RISK—KNOWN DEFECTS.—Deceased was a ferryman employed by defendants to operate a wire ferry. The rope connecting the boat with the wire was frayed, and deceased had applied to defendants for a new rope, though without stating the necessity of prompt action. As a result of the parting of the rope, deceased was drowned. *Held*, that his knowledge of the danger rendered him contributorily negligent. *Chesapeake, etc. Ry. Co. v. Sparrow's Admin.*, 37 S. E. Rep. 302 (Va.).

Knowledge of a defect, in such a case, is more properly regarded as showing consent by the servant to work under the existing conditions than contributory negligence on his part. In other words the defence negatives the duty, on the maxim, *volenti non fit injuria*, rather than excuses its breach. *Thomas v. Quartermaine*, 18 Q. B. D. 685. Later English decisions, perhaps influenced by the stringent provisions of the Employers' Liability Act, distinguish between injuries to one "*scienti*" and "*volenti*," holding that knowledge of a defect does not necessarily imply consent to assume the risk. *Smith v. Baker*, [1891] App. Cas. 325; *Yarmouth v. France*, 19 Q. B. D. 647. The practical value of this distinction is not apparent. Where the defect is as obvious to the servant as to the employer, and no circumstances appear which excuse the servant for continuing work after knowledge of the defect, the master should be excused on the ground that the servant assumes the risk. *Meador v. Lake Shore, etc. Ry. Co.*, 138 Ind. 290; *Sweeney v. Berlin, etc. Co.*, 101 N. Y. 520. Judged by this standard, the result reached in the principal case is correct, though the decision is not rested upon the proper grounds.

TORTS — LIABILITY OF EMPLOYER — INJURY TO SERVANT OUTSIDE HIS DUTY.

— The plaintiff's intestate, a brakeman, in pursuance of a custom known to the defendant, voluntarily left his place of employment to ride upon the engine, and was killed by the negligent derailing of the locomotive. *Held*, that the intestate was outside of his duty, and at fault as a matter of law. *Chattanooga, etc. R. R. Co. v. Myers*, 37 S. E. Rep. 439 (Ga.).

Decisions like that of the principal case are generally said to rest upon the contributory negligence of the employee. *Baltimore, etc. R. R. Co. v. Jones*, 95 U. S. 439; *Warden v. Louisville, etc. R. R. Co.*, 94 Ala. 277. Upon principle, however, it seems sounder to say that an employee, who for purposes of his own voluntarily goes to parts of his master's premises outside his employment, thereby puts himself where the employer's duty to provide him a reasonably safe working place does not extend, and he becomes a mere licensee with only the rights of such licensee. *Wright v. Rawson*, 52 Iowa, 329. Where, however, the facts show notice by the defendant of the plaintiff's presence, he owes a duty to him as licensee not to harm him through negligence. *Gallagher v. Humphrey*, 6 L. T. (N. S.) 684. If such negligence is shown, then the doctrine of contributory negligence may be legitimately invoked to excuse the defendant for his tort. As it was admitted that the defendant was negligent in the principal case, the court should therefore have left two questions to the jury, whether the defendant had notice of the plaintiff's presence, and, if so, whether the plaintiff was himself negligent in riding on the engine.

TORTS — NEGLIGENCE — LAW AND FACT. — *Held*, that the question whether contradicted evidence, if believed, shows negligence, is a question of law for the court. *Halton v. Southern Ry. Co.*, 37 S. E. Rep. 262 (N. C.).

The rule, applicable to most cases of negligence, that the law requires such care as men of ordinary prudence would use under similar circumstances, is plainly a rule of law. In applying it to the circumstances of a particular case, two questions arise: what amount of care would men of ordinary prudence use under such circumstances; and did the defendant use that amount of care? Both are purely questions of fact. *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408. Whether the former of these questions, which the principal case erroneously calls a question of law, should be decided by the court is another matter. Certainly it should be, like any other question of fact, whenever reasonable men could not honestly differ in opinion. *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 193. And a long succession of verdicts on practically the same facts will often enable a judge to decide, upon this principle, cases which, but for past experience, ought to have gone to the jury. From this, by an unfortunate transition, we reach such absolute and artificial rules of law as the "look and listen" rule. 14 HARV. LAW REV. 234. But in general the question, depending as it does on the common sense of the community, is emphatically one for the jury. The authorities, in spite of many loose expressions, sustain this view. 1 SHER. & RED. NEG. (5th ed.) ch. 4.

TRUSTS — BENEFICIAL OWNERSHIP — OBLIGATION TO INDEMNIFY TRUSTEE. — *Held*, that a mere trust relation imposes on the beneficial owner a personal obligation to indemnify the trustee for expense consequential on the legal ownership of the trust res. *Hardoon v. Betillos*, 83 L. T. Rep. 573. See NOTES, p. 539.

TRUSTS — DEATH OF CESTUI — BONA VACANTIA. — A testator died without heirs, devising land to a tenant for life, with no devise over. The land was sold, and the proceeds held by trustees appointed under the Settled Land Act, which provides that such funds "shall for all purposes of disposition, transmission, and devolution be considered as land." 45 & 46 Vict. c. 38, s. 22, sub-s. 5. *Held*, that on the death of the tenant for life, the fund vests in the crown as *bona vacantia*. *In re Bond*, [1901] 1 Ch. 15.

When the *cestui que trust* of personalty dies without next of kin, the State takes as *bona vacantia*. *Middleton v. Spicer*, 1 Bro. Ch. 201. In case of trusts of realty, however, it is held in England that, on failure of the heirs of the *cestui que trust*, the trust disappears, and the trustee holds beneficially on the theory that there is no tenure in equitable interest and thus there can be no escheat of such estates. *Burgess v. Wheate*, 1 W. Bl. 123; *Taylor v. Haygarth*, 14 Sim. 8. The English courts appear not to have recognized that the doctrine of *bona vacantia* could be applied here as well as in case of personalty, though that of escheat might not be. 4 LAW QUAR. REV. 330, 336. This result has been reached in America. *Matthews v. Ward*, 10 Gill & J. 443. In the principal case, the court reaches the correct result by treating the fund as personalty in direct opposition to the terms of the statute. It cannot, therefore, be

considered as overruling *Burgess v. Wheate*, *supra*, though it may indicate a desire to limit its scope.

WILLS — LEGACY — REDUCTION BY SUBSEQUENT NON-TESTAMENTARY ACTS. — A testator provided that all advances to any child, evidenced by certain papers subsequently to be made, should be deducted from that child's legacy. *Held*, that this is not an attempt to alter or complete the will by papers informally executed, and hence the provision is valid. *In re Moore*, 47 Atl. Rep. 731 (N. J., Prerog. Ct.).

A testator cannot in his will reserve the right to alter or complete it by a subsequent unattested paper. *Thayer v. Wellington*, 9 Allen, 283, 291. But he may direct that the disposition of certain property, completely fixed by the will, shall be altered by the happening of subsequent extrinsic events. *Roberts v. Conning*, 89 N. Y. 225, 241. Moreover the occurrence of such events may be entirely within the control of the testator. *Stubbs v. Sargan*, 3 Myl. & C. 507. The distinction, therefore, is between acts not testamentary in character which affect but do not complete the will, and acts of a testamentary nature that actually complete an unfinished will. *Langdon v. Astor's Executors*, 16 N. Y. 1. If the event, upon the occurrence of which the amount of a legacy is to be altered, is of a non testamentary character, such as an advance of money to the legatee; the mere fact that the testator requires the happening of it to be evidenced in a particular way, as by a writing, cannot change its legal effect. *Holmes v. Coates*, 159 Mass. 226. The decision in the principal case, therefore, is obviously correct.

REVIEWS.

THE LAW OF COMBINATIONS. By Arthur J. Eddy, of the Chicago Bar.
Chicago: Callaghan & Co., 1901. 2 vols. pp. xxxviii, 1540.

This useful and admirable book embraces a number of related subjects of great present importance: the law of Monopolies, of "Trusts" and other Combinations of Labor and Capital, the law of Conspiracy, the law of Contracts in restraint of trade, and a commentary on the Federal and State Anti-Trust legislation; together with an appendix, giving the Incorporation laws of New Jersey, West Virginia, and Delaware. Each subject is examined historically, the present business conditions are described, all authorities bearing upon the subject are examined carefully and at length, and the conclusions of the author are clearly stated. One may find here discussions on "cornering" the market, on trade unions, strikes and boycotts, "trusts," restraint of trade, anti-trust laws, and "government by injunction." The book is a monument of research, original and sensible in argument, and thoroughly sound in its conclusions. It will prove most useful for the lawyer in active practice because of its full collection of authorities and its copious extracts from the opinions in cases which a lawyer without a large library might find difficult of access. To the student of law the study of the author's conclusions will be instructive and enlightening, and to the political thinker the comments upon economic questions of present interest will well repay study. These great merits are accompanied with a few defects of form and detail which it seems almost ungracious to point out. Mr. Eddy has treated his subject so fully that a consecutive reading of the book leaves one somewhat confused as to the main trend of the discussion. The material has not been thoroughly digested, and some of the arguments are repeated more than once in different parts of the book. The logical scheme of the work may, however, be grasped by reading the preface and conclusion and then a few principal chapters.

The most striking characteristic of Mr. Eddy's work is its good sound common sense. He deals with refreshing candor with the rather perplexing problems of the business world, and reaches his conclusions in a way that must commend itself both to the student and to the man of affairs. What he says on "government by injunction" is typical of his consistent attitude toward the problems he discusses. "There is, of course," he says, "no such thing as 'government by injunction' . . . of all writs and processes issued by courts the writ of injunction is least administrative in its character." "The injunction simply commands the contending parties to cease their strife until the cause can be heard." "If the acts are neither riotous nor unlawful, nor in any manner oppressive, the mere fact that the parties are inconvenienced until the court can investigate the merits of the controversy is not a matter for serious complaint." "No man who minds his own business and is entirely willing that others should mind theirs has complained of any abuse of discretion by courts of equity in issuing injunctions." Mr. Eddy is unfortunately too broad in the last statement, as he is in some of his other arguments, but the saving common sense is apparent.

The principal part of the book is devoted to an examination of the law of combinations and acts injurious to trades from the middle ages to the present day. The author describes all kinds of illegal commerce, from forestalling to "bucket shopping." The main points of his argument are, first, that no combination is illegal *per se*, even presumptively, but all combinations are illegal if the primary purpose be injury or oppression toward another person; second, that all combinations are subject to this rule indifferently, and the same restrictions apply to combinations of capital and of labor. These sound conclusions approximately represent the law as it is now applied in what one may be pardoned for calling the best jurisdictions in this country; although the majority of states discriminate between capital and labor in these forms of combination.

In dealing with combinations of labor Mr. Eddy has occasion to discuss the well-known decision of the House of Lords in the case of *Allen v. Flood*. His opinion of this unfortunate decision does not differ from that of most courts and writers who have had occasion to comment upon it. The disposition of the case emphasizes the weakness inherent in the present court of final appeal in England. Six lords, men of strong and vigorous intellect, whose united experience in English courts outside of the House of Lords amounted to no more than three or four years, overruled the opinions, not only of the Lord Chancellor and of two law lords, but also of a great majority of all the judges of England. As Mr. Eddy shows, the decision has met with little approval in the American courts.

It may be doubted whether a difference may finally be established between the legality of combinations and of similar acts of individuals not acting in concert. It could hardly be a satisfactory law which would restrain the Standard Oil Company from doing acts which Mr. Carnegie would be allowed to do with impunity, or would enjoin the workmen in a small factory from acting together to coerce their employer while it left the head of a great labor organization free to do as he pleased. The case of *Allen v. Flood* shows the shadowy line of distinction between the act of a combination of men and the act of a man who has power over other men.

After dealing with the subject of combinations and conspiracies Mr. Eddy treats with the same thoroughness contracts in restraint of trade,

which he carefully defines and distinguishes from other trade combinations. He also includes a full commentary on the anti-trust legislation of Congress and of the states. He concludes with a warning against legislative attempts to forbid combinations. Economic laws cannot be controlled by legislation, though abuses may be restricted; attempts to repress all combinations would lead to far worse evils.

Mr. Eddy's book must become a classic on this important and timely subject, and every lawyer must feel grateful that so useful a work has been so well done.

J. H. B.

THE INSTITUTES. A text-book of the history and system of Roman private law. By Rudolph Sohm. Second English Edition. Translated by James Crawford Ledlie, with an introduction by Erwin Grueber. Oxford: Clarendon Press. 1901. pp. xxii, 639.

The present work is the second English edition of Professor Sohm's now standard treatise on the Roman law. Mr. Ledlie, to whom we are indebted for the first English edition, has increased our indebtedness to him by the present accurate and faithful rendering of the revised text. The present volume is based on the eighth and ninth German editions, which were published last year. The notes which the editor has appended to the text are very few, and relate only to questions concerning the translation. Professor Grueber has again written an introduction, but it is much shorter than that which he furnished for the first English edition, and only outlines the use to which the present text is put in the German universities.

The very extensive revision of the original work was rendered necessary by the passage in 1896 of a code for the German Empire which went into effect in 1900. This legislation is intended to provide a solution for all questions involving points in the so-called "private" law, and in this sphere supersedes the older rules which were based almost entirely on the Pandects of Justinian.

The work for this reason has been altered from one treating of the law as it was in practice to a history of the system on which the present laws are based, with a view to their more correct interpretation. Although the old title is retained, a new sub-title is added, which shows this change in its character. To make the treatise answer its new purpose, the author has enlarged the historical portion, and has added sections dealing more at length with the history of the law under the Empire (§§ 19 and 20) and with its later development in Europe during the middle ages (§§ 23-28). These additions rendered superfluous the rather extended introduction to the first English edition. Alterations were made necessary by the new light thrown on certain portions of the subject by later writers, and in deference to Professor Wlassak's recent researches Professor Sohm has rewritten the sections dealing with formula procedure and its formulas (§§ 49, 50). Some changes in the theories advanced in the earlier editions ought also to be noticed. These are to be found in the chapters dealing with the classification of persons into those denominated "juristic" and those denominated "natural" (Book II.) and in the section treating of the "literal" contract. On this last point the author has returned to the earlier theory of Keller after having advocated that of Voigt in his earlier editions (§ 81). There are many minor alterations which will be found recorded in Mr. Ledlie's short preface.

The present volume is a distinct addition to the English books treating of the Roman law, and coming as it does from an acknowledged authority, it must be well received by all students of the civil law and especially by those who care to know its history and its bearing on the present law of Germany.

H. F.

THE CONSTITUTIONAL HISTORY OF THE UNITED STATES, 1765-1795. By Francis Newton Thorpe. Chicago: Callaghan & Co. 1901. 3 vols. pp. xxi, 595; xix, 685; xvi, 718.

The distinction between the constitutional and the political history of the United States is necessarily vague. Political issues have constantly turned on the construction of a written constitution, and as the interpretation has affected politics, politics has inevitably affected the interpretation. The constitutional historian, therefore, will find difficulty in limiting his subject. The present author, however, seems to have gone too far, and excluded much that would have conduced to clearness, even if not strictly within his field. But he has also imposed upon himself another and a more serious limitation. He conceives American constitutional history as the history of the Constitution in its strict sense, that body of fundamental law which cannot be changed by an ordinary act of the legislature. If this is correct, then another title must be found for works which deal with the growth of what might be called the American Constitution in its larger sense, namely, all those customs, laws, and institutions which determine how the powers of the state shall be exercised. Such a work would consider, for instance, not only the constitutional provisions as to presidential electors, but also the laws by which they are elected by the people of the states and the custom by which they have lost all freedom of action. To such a work, we think, the term constitutional history is more properly applied.

An historical work in the narrower field, written from a purely legal point of view, might well be useful, but such is not the one before us. The writer, exaggerating the influence of abstract ideas, tends to present our constitutional development chiefly as a result of those ideas and general principles which have hitherto characterized our political thought. These, however, are exemplified as much by our extra-constitutional institutions as by the Constitution itself, and the work would naturally be expected to consider both.

Accepting the book as a history of the American Constitution, in the light of American political philosophy, it appears the result of painstaking research, but the mass of material, consisting largely of state papers and speeches, arranged in chronological order, is often very confusing. The opening chapters contain many general statements, some too broad, others suggestive indeed, but not worked out in the sequel. The account of the formation and adoption of the Constitution and the early amendments is very complete. The votes in the Constitutional Convention are carefully recorded, the debates there and in the ratifying conventions fully summarized, and the sources of each provision noted. The same method is pursued with all the amendments. The period between about 1800 and 1861 occupies only half a volume. Two separate chapters are given to the principal decisions of the Supreme Court before and after the Civil War. The work has full references and is well indexed but contains no appendix of documents.

H. L. D.

- A SELECTION OF CASES AND STATUTES ON THE PRINCIPLES OF CODE PLEADING. With Notes: Prepared for Use as a Text-Book in Law Schools. By Charles M. Hepburn. Cincinnati: W. H. Anderson & Co. 1901. pp. xxxvi, 651.

The book now before us is the completed volume of which some instalments have already received notice in these pages. 13 HARVARD LAW REVIEW, 531. The author states it as his purpose in making this collection of cases to facilitate the study at first hand of those statutes and decisions which embody the principles of code pleading. The first chapter covers briefly the origin, nature, and extent of code pleading. The second deals with the provision that there shall be but one form of civil action; and the third chapter, which comprises the major part of the book, is devoted to the question in whose name the civil action should be brought. This difficult topic of "the real party in interest," which is at once a matter of substantive and of adjective law, is carefully analyzed. The most important heads are those dealing with the rights of a beneficiary, rights upon the assignment of a chose in action, and the rights of the trustee of an express trust and other representatives. At the beginning of each chapter are given the code provisions which apply to the topic in hand; first, the leading original enactments, and then the present terms of the statutes in the various states. The cases that follow are well chosen and are supplemented by a number of valuable notes upon the more difficult points.

Perhaps the chief objection to this book is its length. When the topic of civil procedure at common law has been condensed into a case book of three hundred pages, it seems almost an absurdity to treat of code pleading, which was designed to simplify the common law procedure, in a volume of more than twice that size. Yet it cannot be said that more cases are given than is necessary, and it is rather upon the codes themselves that the blame is to be laid.

Although this professes to be a work on procedure Mr. Hepburn has occasionally wandered into the realms of substantive law. Such a work as this should be kept as much as possible within its own limits, yet it seems necessary to allow a certain amount of leeway, for some doctrines of substantive law and some leading principles of code pleading are so closely interknit as to be almost inseparable. Whether in the pressure of the more important branches of law, which make such large demands on the student's time, there is left room for the careful study of code pleading which such a case book as this demands, is not a question to be determined by the reviewer. Suffice it to say, however, that if such a work is needed the want is well filled by the present volume. Mr. Hepburn has succeeded in compiling an excellent case book on an admittedly difficult subject.

R. S. T.

- A TRANSLATION OF GLANVILLE. By John Beames, Esq., with an introduction by Joseph Henry Beale, Jr. Washington, D. C.: John Byrne & Co. 1900. pp. xxxix, 306.

In this volume the publishers have reprinted the best English translation of Glanville's "Tractatus," etc., namely, that of Beames, which was issued in 1812. No alterations have been made in the original text. The notes are in every respect as they were, and the learned preface by the early editor is given at length. An introduction by Professor Beale,

of Harvard University, has, however, been added. In this the general history of the treatise and the author has been rewritten in the light of modern investigations. This introductory portion is divided into four chapters. The first is a biographical sketch of the traditional author, Ranulph de Glanville, and gives an outline of the principal events in his career. The second discusses the authorship of the "Tractatus." Professor Beale is inclined to compromise between the traditional view and Professor Maitland's suggestion that it was the work of Glanville's nephew and secretary, Hubert Walter. The view is advanced that the general outline was the idea of the chief justiciar, but the execution was left in large part to his secretary. This offers a very plausible solution to a problem on which the evidence is so scanty that no dogmatic opinion is permissible. The third part of the introduction deals with the character of the treatise itself, and outlines the reforms of Henry the Second. The fourth part gives a succinct account of the actual state of the law as it was in the middle and latter part of the twelfth century.

The present volume is the first of what is to be known as the "Legal Classic Series," whose purpose is to reprint standard translations of the earlier treatises on the law of England. The object of this is twofold: to enable all to procure a copy of such treatises, and to place them before the public in such a form that they can be read by the average practitioner, to whom the perusal of a Latin text would perhaps not be entirely satisfactory. Such a purpose cannot be too highly commended. Every American, whether he be a lawyer or not, should be familiar with the outlines of our legal as well as our political history. To accomplish this no method is more satisfactory than a careful reading of our earlier treatises. Moreover there are, and always must be, in a system like ours, many rules, which, considered from the point of view of reason alone, must seem, even to a lawyer, illogical and arbitrary in the extreme, but which can all be satisfactorily explained when the origin and history of each is known.

H. F.

THE DEVELOPMENT OF LAW AS ILLUSTRATED BY THE DECISIONS RELATING TO THE POLICE POWER OF THE STATE. By W. G. Hastings. Reprinted from the Proceedings of the American Philosophical Society, vol. xxxix, no. 163. pp. 196.

This excellent and readable essay is that for which the Henry W. Phillips Prize of \$2,000 was awarded by the committee of judges appointed by the American Philosophical Society for Promoting Useful Knowledge. The author finds the first use of the term "Police Power" in its present form in Marshall's opinion in *Brown v. Maryland* (1827), and in the various opinions delivered by the Supreme Court judges in *Mayor of New York v. Miln* (1837). Its subsequent adoption by the federal court in those decisions where state legislation seemed to clash with acts of Congress or the Constitution, and in all courts to denominate the regulating power, was due in large part, he tells us, to the vogue given to the phrase during the states-rights controversy. The author shows that the term is usually considered to include all the unclassified legislative power of the states — and chiefly the power of making regulations of all sorts. It is, he says, that "indefinite supremacy" left in the states after taking away the powers delegated to the federal government by the Constitution and those powers of the states which have specific

names, taxation, eminent domain, etc. The phrase is not capable, therefore, of exact definition.

The greater part of the book is taken up with a discussion in chronological order of the federal decisions involving the police power of the states on the one hand, and of the rights of the federal government under the "commercial power" and the later constitutional amendments on the other. In regard to commerce two points are emphasized. The earlier view that the states could legislate on matters of interstate and foreign commerce until Congress should act is preferred to the present doctrine of the Supreme Court that the silence of Congress upon the matter is taken to indicate an intention that it remain unhampered by any legislation, federal or state. To show that such was the view held by Marshall he refers to the latter's opinion in *Wilson v. Blackbird Creek Marsh Co.*, and says that the only claim of those of the modern school upholding the exclusive power of Congress over interstate and foreign commerce that they are following in the footsteps of the great Chief Justice is based on the statement of Story in *Mayor of New York v. Miln* decided in 1837. Mr. Hastings argues strongly that there is no such hard and fast line of distinction between the police power of a state and the federal commercial power as is now laid down in the Supreme Court, but that they are really the exercise by different sovereignties of the same power of making needful regulations. There is, it seems, a police power vested in Congress as well as in the states, — the power to regulate those matters intrusted by the Constitution to the federal government.

Taking as his thesis the development and application of the term police power in American jurisprudence, the author in his conclusion says that it exemplifies the important part played by habit in our law. He speaks of its use in the application of the common law precedents as balking the intended effect of the Fourteenth Amendment and turning it to quite unexpected uses. This seems to be hardly a fair conclusion, for the amendment is phrased in broad terms and was not expressly confined to the protection of the negro race, as Mr. Hastings contends, and this Amendment as well as those other provisions of our Constitutions which go to make up our Bills of Rights are to be construed with reference to the common law precedents, as such was undoubtedly the intent of the framers of those instruments. Mr. Hastings has given us a very welcome addition to the works on this special subject. The book on the whole is a clear statement of what would seem to be the true principles of constitutional interpretation.

E. S. T.

We have also received : —

A TREATISE ON COVENANTS WHICH RUN WITH THE LAND OTHER THAN COVENANTS FOR TITLE. By Henry Upson Sims. Chicago: Calaghan & Co. 1900. pp. xxxi, 288. *Review will follow.*

A TREATISE ON THE LAW OF SURETYSHIP AND GUARANTY. By Darius H. Pingrey. Albany, N. Y.: Matthew Bender. pp. xvi, 443. *Review will follow.*

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YEAR-BOOK BIBLIOGRAPHY.

ONE hundred years ago the Select Committee appointed to inquire into the state of the Public Records of Great Britain and Ireland recommended that "the series of the Year Books from Edward the First to Henry the Eighth be completed by printing those hitherto unpublished, . . . and also by reprinting the rest from more correct copies, as those which are already in print are known to be in many instances incorrect and erroneous. A general index to the whole would be a very necessary addition to such a work, which forms so valuable a monument of our practical jurisprudence in its earliest ages."

The first part of this recommendation, inoperative for two thirds of a century, was finally acted upon in the year 1863, when the Master of the Rolls began printing, in octavo volumes, the text and translation of manuscript reports of the Years omitted from the printed series of the Year Books. The second part has never been acted upon, although often quoted and commended. Within the last twenty years, representatives of the Clarendon Press, the Inns of Court, and the Selden Society have conferred as to the possibility of a scholarly reprint and annotated translation of the Year Books, — but so far without practical results. A full reprint of the English Reports, recently announced, covers in prospectus the Year Books as well as the later reports. If a reprint is assured, it ought to be possible to get also a good translation. The difficulty lies in the cost of editing. The income from sales can hardly

be expected to pay for the services of competent editors, unless a liberal subscription can be guaranteed, or unless the more or less gratuitous cooperation of legal scholars can be secured. As this monumental literature of the Common Law is part of our inheritance, we ought not only to meet but to anticipate, in the United States, any suggestions in this direction from our friends across the Atlantic.

If a new edition of the Year Books is to be undertaken, the matter of texts becomes of the first importance, and the first step toward comparison of texts is a list of existing editions. It would seem that a literature, which, for two centuries in manuscript, and two centuries more in print, served the daily needs of the learned profession of the law in England, would be easy to trace through every step of its development, and would have a secondary literature of its own in catalogues and bibliographies. But on the contrary, the student of Year-Book texts is confronted at the outset with the fact that information about them is more than meagre. Clarke's *Bibliotheca Legum*¹ epitomizes all that had been said or conjectured on the subject, up to that time, by listing the 1679 edition, and adding:—

"Year Books, 10 parts (wanting Maynard's Edw. II.) . . . printed about 1600. . . .

"The Year Books (for the most part), prior to the publication above mentioned, were printed in separate years and terms by Machlinia, Pynson, Redman, Berthelet, Wight, Rastell, Tottel, etc."

If these paragraphs record all that is known about editions, the work to be first undertaken is evidently bibliographical. It is not so easy to get at the facts in America as it would be in England, but a lame beginning will be better than none at all, and therefore this paper, which might properly be called "Preliminary Sketch for a Bibliography of the Year Books," is offered as an initial contribution toward the preparation of a new edition.

The possible sources of information are the legal bibliographies, booksellers' and auction catalogues, printed catalogues of libraries, histories of the law, the old reports, and the Year Books themselves. Marvin's *Legal Bibliography* and Bridgman's *Legal Bibliography*, and Wallace's "The Reporters," disclose little that is valuable, and their accuracy does not stand the test of verification. The writer's long series of law-booksellers' catalogues, continuous from 1682 to the present time, gives here and there hints where to search further,

¹ Edition of 1819, p. 381.

rather than any really valuable facts. Reeves and Crabb describe the scope, use, and general course of development of the Year-Book literature, without defining editions. The printed catalogues of law libraries, whenever they include any imprints before those of 1679, dismiss them with a brief and disappointing mention. Prefaces to some of the oldest treatises and reports give interesting glimpses of the Year Books. But after all, the only way to make a bibliography of these books is to go to the printed copies as they stand on the shelves of libraries, inspect and collate them, and note with care their typographical characteristics and peculiarities.

Apparently, there are not many libraries which contain the older editions of the Year Books. In the United States, the Harvard Law School Library has a good number of the earlier prints, and Mr. William V. Kellen, of Boston, has recently made a collection especially rich in editions printed during the latter half of the sixteenth century. In England, the British Museum, Lincoln's Inn, and a private collector (who does not wish his name to be mentioned here) have between them nearly all the imprints of 1480-1550. There are also a few specimens in the libraries of Oxford and Cambridge. For this paper the American collections named have been critically examined, a casual inspection has been made of most of the English copies, and more or less thorough collation of the Year Books in the British Museum, in Lincoln's Inn, and in the Oxford and Cambridge libraries has been made for the writer by English friends. There are probably other libraries and collections in England which contain Year Books, cherished as specimens of typography rather than as law books. It is to be hoped that the publication of this article will elicit information as to all of these, so that the editors of a new edition may have before them a list and location of every edition or impression of a printed Year Book which is now in existence.

Examination of the last edition of the Year Books shows that it is made up of eleven Parts, one Part printed in 1678, one in 1680, the other nine in 1679, so that it may be properly called the 1679 (or "Standard") edition. It contains in

- Part I. { Memoranda in Scaccario (only) 1 to 29 Edw. I.
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- IV. Third Part of Edw. III., Years 40 to 50; "Quadragesms."
- V. Liber Assisarum, Years 1 to 50 Edw. III.

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- IV. Third Part of Edw. III., Years 40 to 50; "Quadragesms."
- V. Liber Assisarum, Years 1 to 50 Edw. III.

- VI. Year Books of Henry IV. (Years 1 to 14) and Henry V. (Years 1, 2, 5, 7, 8, 9).
- VII. First Part of Henry VI., Years 1 to 20 (omitting 5, 6, 13, 15, 16, 17).
- VIII. Second Part of Henry VI., Years 21 to 39 (omitting 23 to 26 and 29).
- IX. Edw. IV., Years 1 to 22.
- X. "Long Quinto," or the Long Report of Year 5 Edw. IV.
- XI. Edw. V. (Year 1); Rich. III. (Years 1 and 2); Henry VII. (Years 1 to 21, omitting 17, 18, and 19), and Henry VIII. (Years 12, 13, 14, 18, 19, 26, and 27 only).

Of these Parts, the first alone contains new matter, none of its contents having been before printed. One other Part, the *Liber Assisarum*, is not exactly a Year Book, — nor yet (as it has been described) an abridgment, like Statham, Brooke, or Fitzherbert. It is rather a compilation of selected cases from the manuscript Year Books of the reign of Edw. III., chronologically arranged, like the "Revised Reports" in England, or the "American Decisions" in the United States. One other Part, "Long Quinto," covering only a single year, ought properly to have found place beside the regular or short report of 5 Edw. IV., where it is sometimes bound up in earlier volumes.

The eight remaining Parts are reprints of earlier impressions of Year Books, arranged in chronological order from Edw. III. to Henry VIII., with various unexplained and unaccountable gaps, which are now being gradually filled up by the publication of the volumes of the Rolls series.

The 1679 edition is the one in general use, is found in all public and private libraries which go back to the English folio law reports, — and being the latest, has been generally quoted as the most correct edition. Doubt has been cast, however, on its accuracy by those who have compared it with earlier editions or with existing manuscripts. The Select Committee in 1800 described it as "incorrect and erroneous," and in 1900 Mr. L. Owen Pike, the editor of the current series of Year Books, who may be considered to be the foremost expert in ancient English legal records, said in a letter to the writer of this article: —

"Notwithstanding the statement on the title-page of the edition of 1679, that the text has been corrected and amended, I should, so far as I have seen at present, be disposed to trust the earlier editions in case of any discrepancy. I cannot find any evidence of any collation of MSS. in the 1679 edition, which seems to be practically a reprint, — sometimes a little less but sometimes a little more abbreviated."

Searching backward, therefore, for better texts, we find in many catalogues references to a "quarto" edition "about the year 1600."

But on further investigation it becomes evident that the 1679 set is the only complete edition, — and indeed the only edition of the Year Books as a whole. At different times, from 1587 to 1638, the volumes known as Parts II. to XI. of the standard edition were reprinted or collected from former prints, and made up into sets of ten small folio (not quarto) volumes, according to the choice or the opportunities of the owner. The volumes, thus incorrectly called the "quarto edition," appeared in the following order: —

1587. Long Quinto.	1605. Henry IV. & V.
1596. First Part of Edw. III.	1606. Liber Assisarum.
1597. Edw. V., Rich. III., Hen. VII. & VIII.	1609. First Part of Henry VI.
1599. Edw. IV.	1619. Second Part of Edw. III.
1600. Quadregesms.	1638. Long Quinto again.
1601. Second Part of Henry VI.	

During the fifty years covered by these reprints, lawyers were still using previous imprints, and the "sets" of ten volumes of this period include not only these reprinted volumes, but also volumes covering the same regnal years as the 1679 and 1600 "Parts," but variously made up of whatever earlier impressions the owners happened to have or to get.

For instance, the last three sets examined by the writer were made up as follows: —

First Part of Edw. III.	Yetsweirt, 1596.	Yetsweirt, 1596.	Yetsweirt, 1596.
Second Part of Edw. III.	Tottell, 1585, etc.	Tottell, 1561, etc.	Co. of Stationers, 1619.
Third Part of Edw. III.	Wight, 1600.	Wight, 1600.	Wight, 1600.
Liber Assisarum.	Tottell, 1561, etc.	Co. of Stationers, 1606.	Co. of Stationers, 1606.
Henry IV. & V.	Tottell, 1563, etc.	Wight, 1605.	Wight, 1605.
First Part of Henry VI.	Co. of Stationers, 1609.	Co. of Stationers, 1609.	Co. of Stationers, 1609.
Second Part of Henry VI.	Tottell, 1555, etc.	Tottell, 1567, etc.	Wight, 1601.
Edward IV.	Tottell, 1555, etc.	Tottell, 1556, etc.	Wight & Norton, 1599.
Long Quinto.	Tottell, 1587.	Tottell, 1587.	More, 1638.
Edw. V., Rich. III., Henry VII. & VIII.	Tottell, 1556, etc.	Tottell, 1555, etc.	Yetsweirt, 1597.

Tracing the texts still farther back, it appears that prior to the year 1590 the Year, and not the reign or "Part," was the unit of printing. The volumes designated in the above table as Tottell, 1585, etc., Tottell, 1555, etc., are found on examination to be composed of Years separately folioed and dated, evidently issued first as individual pamphlets, and afterwards bound up in chronological order, without common title-page or index. This statement applies to nearly all Year-Book issues from 1590 back to the earliest prints in 1481 or 1482, — although in the period from 1550 to 1590 there was a tendency to the gradual combination of Years into volumes.

With this discovery began the real interest and labor of this research. Each volume had to be examined with care, and separated into its constituent parts. At first it only seemed necessary to note the date (if given) and the printer's name on each original Part or Year. But in the course of collation it appeared that there were Years bearing the same date and printed by the same printer, which were entirely different. Comparison of texts proved that the type had been entirely reset in many such cases; and to differentiate, it became necessary to note carefully all peculiarities of type, initial letters, "symbols," and colophons in each "piece." In the lists appended, such variations in issues of the same date have been indicated by numbers, 1, 2, etc. Those noted have been among the editions printed by Tottell, and are often (but not always) further distinguished by different spelling of his name. The most marked example of this peculiarity is Tottell's 1556 imprint of 19 Edw. IV. Inspection of Table A will show that he issued that Year four times, with different type but with the same date. Similar reprints of Years without change of date may have happened with earlier printers, but without actual collation it is difficult to discriminate between such reprints, and the writer has not had opportunity to examine side by side and carefully compare the editions printed before 1550.

Close examination discloses another interesting fact, — that in some instances a Year Book is made up of one or more sheets or signatures of one edition, and the remaining sheets of an edition of some other date. Thus a copy of 21 Edw. IV., examined by the writer, has 80 leaves of Tottell's 1584 imprint, with 4 leaves, including the colophon, of his 1566 No. 1 edition.

It would seem from these facts that while the printers issued separate Years, and even supplied separate sheets occasionally to complete imperfect Years, the booksellers and lawyers bound together, after 1550, and probably even before that time, these separate pamphlets in chronological order, by reigns, with very much the same arrangement followed in the 1679 edition. But there was no uniformity of editions or imprints, — every owner making his own combinations, as he happened to get hold of different editions of the separate Years. Of many such volumes examined by the writer, he has never found two alike. Table B, appended, shows the make-up of nine bound volumes of the Years of Edw. IV. belonging to the period between 1550 and 1590, and illustrates clearly this irregularity of combination. Mr. Kellen, in his collection, has separated such volumes into their original parts,

and by rebinding these has been able to place side by side the different editions of each Year, as originally published, ready for scholarly collation and comparison.

The results of the writer's examination and collations have been recorded on a series of cards which embody full notes as to the typographical and other surface characteristics of each edition of Years or groups of Years. It would be impossible to include all the contents of these cards within the limits of a magazine article, but tables A and C, printed herewith, give abstracts of the main facts ascertained and recorded. Table A is a chronological list of all the printed Years which have been discovered, with some distinguishing marks, and with notes as to the libraries in which each edition may be found. Table C is a conspectus, which exhibits graphically the successive phases of Year-Book printing from 1480 to 1680. At the risk of partial repetition, the results of the writer's investigations and the contents of these tables may be summarized as follows:—

The issue of Year Books began seven or eight years after printing commenced in England. Caxton apparently printed none, nor did Lettou, either while alone or during his brief collaboration with Machlinia. To William de Machlinia (William Machlinia or Macklyn), without date, but probably about 1481 or 1482, are attributed Year Books of 33, 34, 35, 36, and 37 Henry VI., and also 20 Henry VI. Year 34 (imprint "Macklyn") is the only one of these Years with name. Year 20 is not assigned to Machlynia by Ames & Herbert,¹ but being bound up in Exeter College Library, with the Macklyn Year 34, and being in similar type, it is credited to the same printer in the library catalogue. Why Machlynia selected these Years for publication is a problem for discussion. It will be noted that they are nearly contemporaneous reports, covering years 1455 to 1459, only a little over twenty years prior to their publication.

Whether Wynkyn de Worde in his long business career ever printed Year Books is uncertain. Two unsigned and undated Years, 17 and 18 Edward III., are attributed by Ames & Herbert to either de Worde or John Rastell on account of peculiarities of type. Ames & Herbert discredit, however, Pfalmanaazaar's conjecture that de Worde printed Year Books conjointly with Pynson.

Richard Pynson or Pinson (dates of printing 1493 to 1528) was the first systematic publisher of Year Books. His earliest dated

¹ *Typographical Antiquities.*

edition is 3 Henry VI., Oct. 12, 1510, but four of his undated pieces have been assigned by experts to the last ten years of the fifteenth century. Only seven of his Year Books are dated (1510-1520). Fifty editions surely, and perhaps five more, bear his name. There are also sixteen unsigned and undated editions which are attributed to Pynson, — although some of them may possibly be de Worde's.

Before 1510, Pynson's selection of Year Books to print does not explain itself; but between 1510 and 1520 (apparently) he covered consecutive periods by printing all the Years 40 to 50 Edw. III., most of the Years of Henry VI., and nearly all the Years of Edward IV. He appears to have printed only three contemporaneous Years, 9 Henry VII. (1494), 12 Henry VII. (1497), and 14 Henry VIII. (1523). This may indicate that the latest reports were not valued most in those early days, or perhaps that the reporters or scribes had some sort of jealously guarded monopoly in their manuscripts.

John Rastell (dates of printing 1517 to 1533) published several law books, and may perhaps have printed some of the no-name, no-date Year Books of that period, though none except 17 and 18 Edw. III. have been attributed to him.

Robert Wyer (dates 1527 to 1542) printed only one Year, 9 Henry IV., without date.

Robert Redman (1525-1540) and Thomas Berthelet (1529-1554) printed or reprinted over forty Years, most of them without date.

About 1540-1550, William Myddylton (1541-1548) printed or reprinted ten Year Books; Henry Smyth (1545-1546) nine; and William Powell (1547-1567) seven; nearly all without date.

In 1553, the field of Year-Book publication was entered by Richard Tottell, who for thirty-eight years occupied it so fully as to admit no rival. There are about 225 known editions of separate Years or groups of Years which bear his imprint or can be surely attributed to his press. He not only reprinted all the Years already published, but he also printed for the first time all the other Years which have been included in subsequent editions. He is preëminently *the* publisher of the Year Books, and he so completely put them "in print" and so cheapened their price that he evidently made them a popular and profitable literature. In his preface to a 1556 edition of Magna Charta, he says (in regard to his Year Books): —

"How unperfit the bokes of the lawes of England were before, what price the scarcenes had rayseyd, the most part mervelously mangled, &

no smale part no wher to be gotten, ther be enow, though I rehease it not, that do freshlye remember, & can truely witness. Likewise how, sithens I toke in hand to serve your uses, that imperfections have been supplied, the price so eased as the scarcenes no more hindreth but that ye have them as chepe (notwithstandinge the common dearth of these times) as when they were most plentiful, the print much pleasanter to the eye in the bokes of yeres than any that ye have ben yet served with, paper & margine as good & as faire as the best, but much better & fairer then the most, no smal number by me set forth newly in print that before were scant to be found in writing. I nede not my self to report it.

"For the exact truth therof, my copies I might wel follow as thei were, but I could not my self correct them as they ought to be. Therefore in some workes, where I could, with my entreatie or cost, procure learnede helpe, ye have them not smally amended; in some other where I could not, yet dare I answer they are nothinge appeired. . . ."

Tottell had one idiosyncrasy which puzzles the bibliographer and bewilders the proof-reader, — he spelled his name in many ways in different editions and sometimes in different parts of the same edition, apparently from sheer wilfulness, although more careful study of his methods may perhaps disclose a system. He varies his first name Richard, Richarde, Rychard, and Rycharde; and his surname Tathyll, Tothill, Tottle, Tottel, Tottell, Tottil, Tottill, Tottyl, and Tottyll. Other old printers have occasional eccentricities in spelling; he alone appears to vary constantly and intentionally.

Notwithstanding this vagary, his imprints make up the great bulk of the early Year-Book literature, and in view of his employment of "learneder helpe," may offer a good field for critical and editorial investigation. As a voluminous printer for the span of a whole generation, and as a man of strong individuality, Tottell deserves more attention than he has yet received from historians of English printing.

Before Tottell's time (except in the one instance of 1 to 8 Henry VII., printed without name or date, probably by Pynson about 1505) the Years had always been printed separately, or at the most two Years together. Very early in his career as a printer he began to group the Years. In 1553 he printed 1-14 Henry IV. as one book; in 1555, 1-21 Henry VII.; in 1556, "Quadragesms;" in 1562, 1-10 Edw. III.; and in 1563, the Years of Henry V. But except in publishing or republishing these groups, he followed the earlier fashion of printing separate Years until his death. The period of printing individual Years may there-

fore be said to have lasted from 1481 to 1591, — something over a century. "Long Quinto" is the only survival of this method.

In 1596, Jane Yetsweirt republished 1-10 Edw. III. in one volume, and a year later collected and published in one volume the Years of Edw. V., Rich. III., Henry VII., and Henry VIII. In 1599, Wight & Norton printed in one volume the Years of Edw. IV. Wight (alone) reprinted "Quadragesms" in 1600; the Second Part of Henry VI. in 1601, and the Years of Henry IV. and V. in 1605. The Company of Stationers published the Liber Assisarum in 1606, the First Part of Henry VI. in 1609, and, after an interval of ten years, the Second Part of Edw. III. in 1619, and the Years of Edw. V., Rich. III., Henry VII., and Henry VIII. in 1619-1620. With the exception of a reprint of "Long Quinto" by the Assigns of John More, in 1638, this closed the period of collected volumes, or of the "quarto" or "1600" "edition," covering about forty years of publication, and forty years more of use.

The activity of Tottell, and this gradual publication of the volumes of the "quarto edition," seem to have supplied the demands of the legal profession for nearly half a century. But by 1678 the Year Books had again become so scarce that the set of ten volumes — according to Clarke's *Bibliotheca Legum* — sold for £40.

In 1678, George Sawbridge, William Rawlins, and Samuel Roycroft, Assigns of Richard and Edward Atkyns, printed for T. Bassett, J. Wright, and James Collins, the Year Books of Edward I. and Edward II., never before put in type, "*selonq; les ancient Manuscripts ore remanent en les Maines de Sir Jehan Maynard, Chevalier, Serjeant de la Ley.*" A preface tells little about the genesis of the volume, but quotes Selden (*Diss. ad Fleta*) as believing Richard de Winchedon to be the contemporary reporter of the years of Edward II.; and as saying that there was "some small variety in the copies" (or manuscripts) known in Selden's time.

After issuing this new volume, the same printers proceeded to reprint the now out-of-print volumes of the "quarto" set, issuing nine volumes in 1679, and the other (Long Quinto) in 1680. These ten volumes were not printed for the three booksellers named in the 1678 volume, but were to be sold, according to their title-pages, by fifteen different booksellers in London. This looks as if the Atkyns Assigns were the publishers as well as the printers, and the booksellers only retailers or distributing agents.

In this edition, the Parts or volumes are numbered chronologically, Part I. being Maynard's Edward I. and II.; the first (1-10

Edward III.) of the former "quarto edition" becoming Part II., and so on. The large folio form adopted by the publishers enabled them to get both sides of one leaf or folio of former editions into one page of this one, the beginning of the "reverse" of the original folio being indicated in the text, and also in the margin, by [B]. The new paging therefore corresponds with the old folios.

The tables printed herewith are as complete as the writer's opportunities of research allowed, but there were doubtless editions printed which have not been preserved in any of the libraries examined, and therefore have not been noted. In some cases the earliest editions here mentioned refer to previous imprints. Thus, Redman's 38 Henry VI. is said to be "newly correctyd," and the same printer's 17 Edward IV. was "noviter impressus," although no earlier editions have been found.

The fact that single Years were first published in pamphlet form is indicated not only by their separate folios, registers, and colophons (there were very few title-pages to these early editions), but also by the note found at the end of some of the Years, — "the prisce of thys boke ys xii. d. un bounde."

In the earlier stages of Year-Book printing, little attention was given to uniformity of paging in successive editions. For instance, take 3 Henry VI., Pynson's no-date edition has 58 folios, Pynson of 1510, 52; Smythe, 58, and Tottell's reprints all have 56. Maclyn's 34 Henry VI. has 91 folios; Pynson's, 58; and Tottell, 54. The no-name (Machlinia?) 35 Henry VI. has 56 folios; the no-name (Pynson?), 70; Redman, 76; Tottell's, 64. From Tottell's time onward each page of a reprint seems generally intended to contain exactly the same contents as the corresponding page of the edition reprinted. It is fortunate, however, that citations were always made to placita, term, and regnal year, for citation to folios would have been frequently ineffective on account of the errors in paging which abound in the reprints.

There are few tables of "Errata." In Berthelet's 21 Edward III. an address, "Typographus Lectori," gives six lines of errata; and Redman's 30 Edward III. has at the end half a page of "Faultes escapyd in the prentyng." The printer quaintly adds, "The other faultes are suche that they may be easely amendyd with a penne." But absence of errata does not imply accuracy in printing. The writer, while not undertaking to examine the text, has made memoranda on his cards of all manifest errors in head-lines, folios, and register, and these are so numerous as to warrant

the suspicion that many of the editions are full of typographical mistakes in the text as well.

It is difficult to discover in the Year Books anything which throws light on their history. Before 1550 there are few title-pages, and those of later date are usually the barest records of title, printer, place, and date. There is hardly a preface in the whole line of single Years. Occasionally a brief note occurs to throw a provoking rather than illuminating ray of light on the circumstances of editing or printing. There is thus no internal record, nor is there any record in the history or the literature of the Year-Book era, as to their origin, development, methods of reporting, publication, multiplication, use, or sale. Many copies now extant, however, are full of manuscript notes in the cramped court-hand of former owners. While these are probably nearly all comments on or analyses of the cases, there may be here and there bits of bibliography or history which would piece out the meagre inferences we can draw from the rare suggestions of title-pages, prefaces, and notes. This reticence of the Year Books as to themselves is probably due to the fact that they went through such a regular and gradual course of development, that what each generation of lawyers who used them knew about them, as they knew all facts of everyday life, they did not consider worthy of formal record, and the details we are now eager to discover have drifted even out of range of tradition.

Legal writers, from Coke to Blackstone, seem to have believed that the Year Books were compiled by salaried official reporters, but modern scholarship is inclined to discredit the idea. On his cards containing full memoranda the writer has recorded many facts bearing on this matter, but their statement and consideration would require a separate essay.

Mr. Pike, in the preface to 12 and 13 Edward III., p. xxxi, says, "The Year Books published in the sixteenth and seventeenth centuries seem to have been printed in every instance from a single manuscript without collation." This view is probably correct as regards first editions, but there are many traces, in the reprints, of comparison of manuscripts. Even in Pynson's no-date 20 Henry VI., printed about 1503, there are said to be "many cases added." In 2 Edward III. there are two series of cases, the second series being "taken out of another report." The "residuum" in several editions (for instance, Myddylton's 7 and 8 Henry VI.) seem to be cases added from other manuscripts. In 43 Edward III. there are additional cases "from an old manuscript."

The "long" and "short" reports of Years 5 and 21 Edward IV. are marked instances of reports from apparently different sources.

There are also occasional traces, in the Year Books, of editorial revision. Some of the Years (37 Henry VI. is one) have copious references to other Year Books. The "Telos" to 40 Edward III. refers to annotations in the text. Tottell claims for his 1555 "Quadragesms" that the reports were "a mendis quibus miserrime scatebant repurgati et suo nitore restituti." His statement that he got help when he could, when correcting texts, has already been quoted. In all his Year Books published in 1584, the same printer tried the experiment of numbering right through each year not only the "placita" (which had been usually numbered by terms in previous editions), but also all the "points" of the arguments, which had been distinguished before (if at all) only by printers' symbols, — such as C, ¶, etc. This radical innovation did not apparently meet the approval of courts and lawyers, for it was not continued or repeated in subsequent Year Books. Several of the volumes of the so-called "quarto edition," were annotated with references to Brooke's Abridgment, or to Fitzherbert's Abridgment, or to both. All the volumes of the 1679 edition claim to be "corrected." Parts II., VIII., and IX. have references to Brooke and Fitzherbert; Part III. to Fitzherbert only; Parts IV. and VI. to Brooke, Fitzherbert, and Statham; Parts V., X., and XI. to Brooke alone; while Part VII. is only "newly perused and corrected."

In many of these Parts the "notations" were copied without addition from previous editions. According to a contemporary catalogue of law books (Basset's, 1682) the only new editorial matter claimed for the 1679 edition was as follows: "Besides the addition of a Table to Edw. III., First Part, never before printed, there are in four of the said volumes (*viz. Lib. Assisarum, Edw. IV., Hen. VI., the First Part, and Hen. VII.*) variety of References (by an Eminent Person) not printed in any of the Former Editions." There is no general preface or note to the 1679 edition explaining its *raison d'être*, or this matter of editing.

Many interesting speculations and inquiries are opened up by this study of the external characteristics of the Year Books. But as most of them approach the higher grounds of criticism, the low level of bibliography may be properly left at this point, deferring to legal scholars all further discussion of topics suggested by the facts herein recorded.

Readers of this article who note errors, who can suggest additions to the lists, or who have any comment or criticism to offer or questions to ask, are invited to correspond with the author.

Charles C. Soule.

No. 6 ASH STREET, CAMBRIDGE, Mass.

NOTES TO THE TABLES.

All editions, unless otherwise noted, are folio, and are without title-pages.

All are numbered by folios, — one number for each leaf, except where it is stated that they are paged. A and B; recto and verso; obverse and reverse, are used to designate the two sides, front and back, of the leaf.

No-date editions are assigned to columns in Table C, according to the indications afforded by type and style. But this assignment is, after all, only guesswork, and must be subject to revision and correction.

Numbers are given to different editions of the same date in the order of their examination by the writer, and not because No. 1 is supposed to have been issued before No. 2, — which will have to be decided by further comparison of the editions.

Where a Latin name is used on a title-page or in a colophon — (for instance, per me Richardum Tottelum), the English equivalent (as Richard Tottel) — is here given.

(i) signifies that the first page bears no number.

"Register" is the record of signatures (A, Ai, Aii, etc.) at the bottom of pages, marking the successive sheets of paper on which the publication is printed.

"Colophon," is the printer's record of name, place, and date of publication, at the end of the edition.

"Point" is used to denote a separate judgment, argument, or statement in the text, usually marked by a symbol, — and in Tottell's 1584 editions, marked by a number. "*Les lettres & figures monstrent tout les points del Arguments & Cases,*" — *Title page to the Companie of Stationers' 1620 Edw. V., Rich. III., Henry VII. & VIII.*

"Symbol" is used to describe the printer's characters (C, ¶, ¶, etc.) placed at the beginning of lines, paragraphs, or points.

The abbreviations used in the Tables signify: —

In General: C. R. = Continuous register.

C. R. & F. = Continuous register and folios.

Colo. = Colophon.

F. L. C. = First line of Colophon.

N. D. = No date.

N. N. = No name.

T. P. = Title-page.

Y. F. S. = Years folioed separately.

Y. P. S. = Years paged separately.

Libraries containing Year Books: —

A. S. = All Souls College, Oxford.

B. = Bodleian, Oxford.

B. M. = British Museum.

C. = Cambridge (Eng.) University,

D. = Private Collection, England.

E. = Exeter College, Oxford.

H. = Harvard College Law School.

K. = W. V. Kellen's Collection.

L. I. = Lincoln's Inn.

Tr. = Trinity College, Oxford.

The lists here printed give only the record of printer's name and dates, with a few notes. The full cards from which the lists are abridged give also, for each edition, record of the following items:—

Title-page (if any); — a full transcript, with lines defined by the usual separation symbol /.

Where there is no title-page, the first line or lines on the first page, with the preceding symbol.

Register of the edition (twos, fours, sixes, or eights, — *say*, A to G).

In editions not folioed, — memorandum as to whether there are catchwords at the bottom of pages.

The number of leaves, with record of folios or paging.

The number of lines to a page.

The size of the printed page, including head-line, but excluding signature and marginal notes.

Errors in folios, head-lines, and register.

Use of initial letters, symbols, and side-notes or marginal catch-words.

Editorial notes, or other peculiarities in the text.

Colophon (or final lines) in full, with lines defined; the symbols prefixed; and the kind of type used.

30	N. d.	Richard Totell	42	i-xlii.	B.M.: D.: K.: L.I.: Tr.	On fol. xlii is a list of "Faulces escaped in the printing."
do.	1561	Richard Totell	34	i-xxxii (error).	B.: B.M.: D.: H.	
do.	1565	Richard Totell	32	i-xxxii	B.: B.M.: K.	
[Oat]						
38	1520, Ides of March.	Pynson.	44	(i)-xliii.	B.M.: D.: H.: L.I.: Tr.	Pynson's device, No. 6, at end.
do.	1561	Richard Totell	38	i-xxxvii + i blank.	B.: B.M.: D.: H.	
do.	1565	Richard Totell	38	i-xxxvii + i blank.	B.: B.M.: K.	
39	N. d.	Richard Totell	50	i-]	B.M.: D.: H.: Tr.	On fol. 10 is a list of "Faulces escaped in the printing."
do.	1561	Richard Totell	38	i-xxxviii	B.: B.M.: D.: H.	
do.	1565	Richard Totell	36	i-xxxviii	B.M.: K.	Years 10, 20, and 31 to 37 omitted. With "Notations" and References to Fitzherbert.
17-39	1619	Co. of Stationers.	?	?		do.
do.	1679	Various printers.	?	?	In general use	do.
40	N. d.	Pynson.	30	i-xxx.	B.M.: L.I.	
do.	1534, March 10.	Richard Totell	52	i-iii	B.M.: L.I.	
41	N. d.	Pynson.	24	i-xxxiv	B.M.: L.I.	
do.	N. d.	Richard Totell	36	i-xxxviii	B.M.: L.I.	
42	N. d.	Pynson.	24	i-xxxviii	B.M.: L.I.	
43	N. d.	Pynson.	26	i-xxxi	B.M.: L.I.	
44	N. d.	Pynson.	24	i-xxxi + i blank.	B.M.: L.I.	
45	N. d.	Pynson.	24	i-xxxi + i blank.	B.M.: L.I.	
46	1517	Pynson.	30	i-xxxi	B.M.: L.I.	
47	1534, Idibus quinta Junii	Pynson.	30	i-xxxi	B.M.: L.I.	
48	1538, May 10.	Pynson.	32	i-xxxi	B.M.: L.I.	
49	N. d.	Pynson.	34	i-xxxi (error).	B.M.: L.I.	
50	1519	Pynson.	28	Not folioed.	B.M.: L.I.	
40-50	{ 1555: (title-page) ^a 1556, Jan. 13 (o'o). 1565 (title-page) ^b 1565, Aug. 13 (o'o). 1576 (title-page) ^c 1556, Jan. 13 (o'o). }	Richard Totell. Richard Totell. Richard Totell. Rycharde Totell Totell.	?	?	H.: Tr.	Pynson's device, No. 5, at end. Pynson's device, No. 6, on recto of last leaf. "Quadragesima."
do.			?	?	B.M.: K.: L.I.	T.P.: C.R.: Y.F.S.
do.			?	?	?	T.P.: C.R.: Y.F.S.

¹ The Harvard and the Kellen copies show slight differences. The cases are the same as those given in Totell's 1562, 1 to 10 Edw. III. Year 2. In the Pynson print, the headlines read "47 Edw. III.", and only the term headlines read "7 Edw. III." How is so glaring an error accounted for?

² These copies have not been closely compared for differences in text.

³ Ames & Herbert, vol. 2, p. 813, say that Totell printed 17 and 18 Edw. III. in 1561. No copies have been found. May they not mean one of the undated editions?

⁴ The duplicated pages xxxix to xxxix include the "residuum" or additional cases reprinted from Redman's long report of Year 24.

⁵ "A mendis quibus mittere scutellati repurgati et suo pñori restitui." — *Title-Page*.

⁶ Year 24 has "certaine cases taken out of an old written copy, not before imprinted."

⁷ Ames & Herbert, vol. 2, p. 821, report this edition (1576-1556) by Totell; — spelling not defined. No copy has been found.

Hen. VI. I.	N. d.	Pyson...	8	Not folioed	D: L. I.	Pyson's device, No. 3, at end.
do...	N. d.	Kedman...	to	(i)-x (?)	B.M.	
do...	N. d.	Smyth...	to	(i)-ix + 1 blank.	C: H.	
do...	N. d.	Middylton...	to	(i)-x	K.	
do...	1566, Jan. 29	Richard Tottell...	8	(i)-viii	B.M.: H.: K.	
do...	1570	Richard Tottell...	8	(i)-viii	A.S.	
do...	1582	Richard Tottell...	8	(i)-viii	B.: K.: L. I.	
do...	N. d.	Pyson...	16	Not folioed	B.M.: C.: L. I.	
do...	N. d.	Kedman...	16	(i)-xvi (?)	B.M.	
do...	1547, July 18	Middylton...	16	(i)-xvi	D.	
do...	N. d.	Smyth...	16	(i)-xvi	C: H.: K.	
do...	1556, Jan. 29	Richard Tottell...	16	(i)-xvi	B.M.: H.	
do...	1570	(?) Tottell...	16	(i)-xvi	A.S.	
do...	1582	Rychard Tottell...	16	(i)-xvi	B.: K.: L. I.	
do...	N. d.	Pyson (early?)	58	(i)-liii	D.	
do...	1516, Oct. 12 ¹⁴	Kedman...	52	(i)-lii	C.: D.	
do...	1527, Oct. 14	Smyth...	52	(i)-liii	L. I.	
do...	N. d.	Richard Tottell...	58	(i)-liii	C: H.: K.	
do...	N. d. (1577*)	Rychard Tottell...	56	(i)-lii	B.M.: H.	
do...	1568	Rychard Tottell...	56	(i)-lii	A.S.	
do...	1582	Rychard Tottell...	56	(i)-lii	B.: K.: L. I.	
do...	N. d.	Kedman...	32	(i)-xxxi	B.M.: L. I.	
do...	N. d.	Smyth...	32	(i)-xxxi + 1 blank.	C.: D.: H.	With device subscribed I. M. and I. N.

¹ At the end of Year 40, a note states that "where as ye finde this marke [E], there immediately after^a doth begin mine addition, or fantasme, & continueth no further than to the next Parale. ^a Secondly ye shall note the Justices names, to whose words ye must chiefly geve credence, before the sayings of any of the sargeants." Then follow lists of the Justices and Sargeants in this year.^a This note is in all of Tottell's editions of Quadregisims. Was it also in Pyson's and Redman's Year 40?

² The list of Justices "in the sixt yere of henry the viii." on the leaf following the title, — if contemporaneous, would fix the date of publication in the year 1514: although the prologue is assigned, in the 1679 edition, to Ann. 5, Henry VIII., — or 1513.

³ The page of the 1514, 1561, and 1560 editions, which gives the names of the Shires and Justices of England in 6 Henry VIII., is omitted in the 1606 and 1679 editions.

⁴ These two editions, both dated the last day of September, 1555, at first sight look alike. But on examination, not only the differences here noted, but many others, show that the volume was entirely reset in No. 2. The border to the title-page in No. 1 is light; that in No. 2 is heavy.

⁵ The title-page says: "Omnes anni Henrici quarti ab anno primo usque ad annum decimum quatum" (but the volume ends with Year 14) "non modo impresorium sed etiam manuscriptorum exemplarum collationes emendati, et iam nouiter impressi." The last words would indicate that all the Years of Henry IV. had been previously printed, although copies are known of 7, 8, 9, 11, 12, and 14 only.

⁶ Apparently, Tottell's 1562 and 1563 Henry IV. and Henry V. were printed about the same time, and intended to be bound and used together, although they have separate title-pages and registers, and are often found separately bound.

⁷ Colophon of earlier edition, "primo" (anno) "a quel true Rychingto fuit chief Justic de coen banck. Hals fuit fait Justic a meisme" temps & June chief Baron dell' Eschequer, etc. These words are omitted in the colophon of Powell's edition.

⁸ Three colophons: after Years 1 and 2, "Richard Tottell, Jan. 12, 1563;" after Year 5, "Richard Tottell, Jan. 23, 1563;" after Years 7, 8, 9, "Richard Tottell, Jan. 15, 1563." Evidently grouped and published as one volume. Usually (but not always) bound with Tottell's 1562-3 Henry IV.

⁹ The three groups (1, 2), (5, 6), and (7, 8, 9) have separate registers.

¹⁰ Title-page: "Alquod anni H. V. cum aliquibus manuscriptis exemplaribus collati, et nunquam ante hac impressi." But Year 6, at least, had been twice printed before this.

¹¹ These groups, as in the other 1563 editions, with separate registers, and three colophons, each "Rycharde Tottell, 1570." Years folioed separately. Title-page has same wording as in different editions, but omits the last line from the other edition.

¹² Two title-pages: the first for Year 1, the second for H. V. only. The Table applies only to H. IV.

¹³ Pyson's next dated Year book. It claims to be "nouiter ac diligenter impressus & non minime labore revisi." "Noviter impressus" probably assigns the no-date Pyson Year 3 to an earlier date than 1510.

REGULAR YEARS.	WHEN PRINTED.	PRINTER.	LEAVES.	FOLIOS (OR PAGES).	WHERE FOUND.	TITLE-PAGES, ETC.	NOTES.
Henry VI. 4.	1556.	Richard Tottell.	32	i-xxvii.	B.M.: D.; H.: K.		
do. 1508.	do.	Richard Tottell.	32	i-xxvii.	A.S.		
do. 1592.	do.	Rycharde Tottell.	32	i-xxvii.	B.: K.: L.I.		Rude device at end.
[Cap]							
do. 7.	1558, Apr. 6 ¹ .	Berthelet.	48	i-xviii.	L.L.		
do. 8.	1558, May.	Smyth.	38	i-xxvii.	L.L.		
do. 8.	N. d.	Berthelet.	38	i-xxvii.	L.L.		
7 and 8	N. d.	Smyth.	38	Primo-xxviii.	H.		
do.	1559, Nov. 12.	Meddleton.	86	i-xxvi.	B.M.: C.: D.: K.	C.R. & F.	
do.	1559, Nov. 12.	Richard Tottell.	82	i-xxvii.	B.M.: H.: K.	C.R.: V.P.S.	
do.	1570.	Rycharde Tottell.	82	i-xxvii.	A.S.: L.I.	C.R.: V.P.S.	
do.	1574.	Rycharde Tottell.	82	i-xxvii.	B.: K.	C.R.: V.P.S.	
9.	N. d. (before 1500?).	N. n. (early Pynson?).	92	Not folioed.	D.: Exeter.		Pynson's types, 2 and 7.
do.	N. d. (after 1513?).	Pynson.	68	i-xxvii + i blank.	C.: D.: L.I.		Pynson's device, No. 5, at end.
do.	N. d. No. 1 ² .	Smyth.	68	Primo-lxvii + i blank.	B.M.: C.: H.: K.		Begins C. De termino Pasche | Anno regni Regis Henrici Sexti | Anno nono Henrici Sexti.
do.	N. d. No. 2 ³ .	Smyth.	68	Primo-lxvii + i blank.	H.		
do.	1562, Apr. 22.	Richard Tottell.	68	i-lxvii + i blank.	H.		
do.	1570.	Rycharde Tottell.	68	i-lxvii + i blank.	A.S.: K.		
do.	N. d. (@ 1587?).	N. n. (Tottell?).	68	i-lxvii + i blank.	B.: L.I.		
10.	N. d.	Pynson.	27(?)	Not folioed (+ i blank?).	L.I.		
do.	N. d.	Myddleton.	28	Not folioed: i blank.	D.		
do.	N. d.	Smyth.	28	i-xxvii + i blank.	B.M.: C.: H.: K.		
do.	1561, Feb. 21.	Rycharde Tottell.	26	Not folioed.	B.M.: H.		
do.	1570.	Rycharde Tottell.	26	Not folioed.	A.S.		
do.	1587.	Rycharde Tottell.	26	i-xxvi.	B.: K.: L.I.		
11.	N. d.	Redman.	70	i-xxix (error).	D.: L.I.		
do.	N. d.	Smyth.	68	i-lxix (error).	B.M.: H.		
do.	N. d.	Richard Tottell.	56	i-lvi.	B.M.: L.I.		
do.	1567.	Richard Tottell.	56	i-lvi.	A.S.: L.I.		
do.	1582, June 12.	Rycharde Tottell.	56	i-lvi.	B.M.: C.: D.: K.		
12.	N. d. (1520?).	Pynson.	8	Not folioed.	B.M.: L.I.		
do.	N. d. (@ 1520?).	Myddleton.	8	i-viii.	B.M.: C.: D.: K.		
do.	1562, Apr. 8.	Rycharde Tottell.	8	i-viii.	B.M.: H.		
do.	1574, Dec. 6.	Rycharde Tottell.	8	i-viii.	A.S.: K.		
do.	N. d. (@ 1585?).	Rycharde Tottell.	8	i-viii.	H.		
[Cap]							
14.	N. d.	Redman.	26	Not folioed: i blank.	B.M.: L.I.		
do.	N. d.	Meddleton.	26	i-xxvii (error).	B.M.: C.		
do.	N. d. (a 1556?).	Richard Tottell.	26	Primo-xxvi.	D.: H.: K.		
do.	1562, Apr. 22.	Richard Tottell.	26	i-xxvi.	B.M.: H.		Bound up with 1582 and 1587 Totells of other Years.

do...	1574, Dec. 6.	Rycharde Tottell...	26	1-xxvi	A.S.: K.	Bound up with 1482 and 1587 Tottels.
[Cap.]	N. d. (@ 1585 ?)	N. n. (Tottel ?)	26	1-xxi (error)	B.: L.I.	
do...	N. d. (@ 1520 ?)	Pyson...	34	Not folioed	B.M.: D.	
do...	N. d.	Richard Tottell...	34	1-xxviii	C.: L.I.	First line ¶ De Termino Pasche Anno.
do...	N. d. No. 1.	Rycharde Tottell...	34	1-xxxiii	K.	Colophon symbol ¶.
do...	N. d. No. 2.	Rycharde Tottell...	34	1-xxxiii	A.S.: B.; B.M.: D.	First line De Termino pasche. Anno
39.	N. d.	Redman	80	1-xxx	H.: K.: L.I.	xviii. H. vi. Colophon symbol ¶.
do...	N. d.	Medivion	80	1-xxx	C.	
do...	N. d. (early ?) (* 2)	Richard Tottell...	80	1-xxx	B.: B.M.: D.: H.: K.	
do...	1567	Rycharde Tottell...	80	1-xxx	A.S.: B.; H.: K.	
30.	N. d. (very early)	N. n. (Machina)	47	Not folioed (+ 1 blank ?)	Exter.	Round up with a Machlinia.
do...	N. d. (early ?)	Pyson (@ 1503 ?)	50	Not folioed	C.: D.: L.I.	Pyson's device, No. 6, with border, at
do...	1554, Sept. 11.	Rycharde Tottell...	50	1 to 50	B.M.: H.: K.	end
do...	1556, Jan. 29.	Richard Tottell...	46	1 to xlv	B.: B.M.: H.	Pyson's device, No. 6, with border, at
do...	1570	Rycharde Tottell...	46	(i) to xlv	A.S.: K.	end
1-23.	N. d. (@ 1585 ?)	N. n. (Tottel ?)	46	to xlv	B.L.I.	Pyson's device, No. 6, with border, at
do...	1679	Various printers.	?	?	B.M.: H.: K.	end
31.	N. d.	Pyson	66	Not folioed	In general use.	Full of printer's errors.
do...	N. d.	Redman	66	1-xlii + 1 blank	L.I.	"Additions" on fol. xxxvii; cases not
do...	N. d. (E.P. *)	Richard Tottell...	58	1-viii	B.M.: D.: H.: K.	numbered.
do...	1567	Richard Tottell...	58	1-viii	B.M.: H.: K.	Cases numbered in the "Additions."
do...	1575, Nov. 10.	Rycharde Tottell...	58	1-viii	B.: K.: L.I.	Bound up with 1582 and 1587 Tottels.
32.	N. d. (@ 1518 ?)	Pyson	66	Not folioed	D.	Years 1 to 4, 7 to 12, 14, and 18 to 20.
do...	N. d.	Redman	66	1-ix	H.M.: L.I.	Years 1 to 4, 7 to 12, 14, and 18 to 20.
do...	N. d. (E.P. *)	Richard Tottell...	60	(i)-ix	H.: K.	"Corrigée."
do...	1575, Oct. 18.	Richard Tottell...	60	(i)-ix	B.M.: H.: K.	
do...	1578	Rycharde Tottell...	60	(i)-ix	K.: L.I.	
[Cap.]	N. d.	Rycharde Tottell...	60	(i)-ix	B.	
47.	N. d.	Pyson	10	1-x	C.: L.I.	Pyson's device, No. 5, at end.
do...	N. d.	Redman	12	1-xli	B.M.: D.	A very early Tottel?
do...	N. d. (* 2)	Richard Tottell...	10	(i)-x	D.: H.	
do...	1562, June 5.	Richard Tottell...	10	1-x	H.: K.	
do...	1567 ^a	Richard Tottell...	10	1-x	B.: B.M.: K.	

¹ The colophon indicates careful editing or printing, thus: "Tipographus Lectori. Tandem * hunc annum * absoluti qui diutius in manibus herebat quam volebam. hoc feci ad castigatorem exactum in publicum."
² Folios i and vi are entirely different, and apparently reset, in Nos. 1 and 2; but the other leaves appear, on hurried collation, to be alike in the two copies.
³ Were these two editions? The British Museum copy collates "Medleton;" the Cambridge University Catalogue reads, "Myddylton."
⁴ Query. Were there not two different "no date" editions of Year 19 by Tottel?
⁵ "Cu multa casibus deficientibus termino Trinitatis."
⁶ Are these two editions of this date? The Bodleian copy is reported as reading *Rycharde Tottell*.

REGINAL YEARS.	WHEN PRINTED.	PRINTER.	LEAVES.	FOLIOS (OR PAGES).	WHERE FOUND.	TITLE-PAGES, ETC.	NOTES.
Henry VI. 27.	1575, Mar. 29.	Rychard Tottel.	10	i-x.	K.: L.I.		
do. 28.	N. d. (@ 1512 ?).	Pynson.	12	i-xii.	C.: L.I.		
do.	N. d.	Redman.	10	i-xii.	B.M.: D.		
do.	1556, Jan. 30.	Rychard Tottel.	14	i-xiii + 1 blank.	D.: H.: K.		
do.	1567, Feb. 30 (42).	Rychard Tottel.	14	i-xiii + 1 blank.	B.: B.M.: H.: K.		
do.	1575, Apr. 7.	Rychard Tottel.	14	i-xiii + 1 blank.	K.: L.I.		
[Gap]							
30 and 31	N. d.	Redman.	18	i-xviii.	B.M.: L.I.	C.R. & F.	
do.	N. d.	Myddilton.	16	i-xvi.	B.M.	C.R. & F.	
do.	1556.	Rychard Tottel.	16	i-xvi.	D.: H.: K.	C.R. & F.	
do.	1567, Feb. 27.	Rychard Tottel.	16	i-xvi.	B.M.: H.: K.	C.R. & F.	
do.	1575, Nov. 10.	Rychard Tottel.	16	i-xvii (error).	B.: K.: L.I.	C.R. & F.	
32	N. d.	Redman.	40	i-xi.	B.M.: L.I.		
do.	1556.	Rychard Tottel.	34	i-xxxiii.	D.: K.: H.: K.		
do.	1566.	Rychard Tottel.	34	(i)-xxxiii.	B.M.: H.: K.		
do.	1576.	Rychard Tottel.	34	i-xxxiii.	B.: K.: L.I.		
33	N. d. (very early).	Rychard Tottel.	34	Not folioed.	B.M.: C.		Pynson's device, No. 2, at end.
do.	N. d.	N. n. (Machlinia ?).	66	i-xiii (error).	B.M.: D.: L.I.		Symbols: first line ¶ ; colophon ¶ .
do.	1556.	Rychard Tottel.	56	i-lvi.	D.: H.: K.		Symbols: first line ¶ ; colophon ¶ .
do.	No. 1						
do.	1556, March ye vi. No. 2	Rychard Tottel.	96	i-lvi.	B.M.: H.: K.		Symbols: first line ¶ ; colophon ¶ .
do.	1575, May 14.	Rychard Tottel.	96	i-lvi.	B.: K.: L.I.		
34	N. d. (@ 1483 ?).	Maelyn.	92	Not folioed (+ 1 blank).	B.M.: C. Exeter.		
do.	N. d.	Pynson.	98	Not folioed.	B.M.: L.I.		
do.	1556, the vi. day of	Rychard Tottel.	54	i-lui + 1 blank.	D.: H.: K.		Symbols: first line ¶ ; colophon ¶ .
do.	Marche, No. 12						
do.	1556, ye vi. of Marche,	Rychard Tottel.	54	i-lui + 1 blank.	B.M.: H.: K.		Symbols: first line ¶ ; colophon ¶ .
do.	No. 3						
do.	1575, Apr. 13.	Rychard Tottel.	54	i-lui + 1 blank.	B.: K.: L.I.		
35	N. d. (early).	N. n. (Machlinia ?).	56	i-lvi.	C.: L.I.		
do.	N. d. (early).	N. n. (Machlinia ?).	76	Not folioed.	B.M.: C.		
do.	N. d.	Redman.	76	Not folioed.	B.M.: D.: L.I.		
do.	1556, No. 1.	Rychard Tottel.	64	i-xlii + 1 blank.	B.M.: D.: H.: K.		
do.	1556, No. 2.	Rychard Tottel.	64	i-xlii + 1 blank.	B.M.: L.I.		
do.	1575, June 21.	Rychard Tottel.	64	i-xlii + 1 blank.	B.M.: C.		Symbols: first line ¶ ; colophon ¶ .
36	N. d. (@ 1482 ?).	N. n. (Machlinia ?).	39	Not folioed + 1 blank.	B.M.: L.I.		Symbols: first line ¶ ; colophon ¶ .
do.	N. d.	Pynson.	39	Not folioed.	D.: H.: K.		
do.	1557.	Rychard Tottel.	34	i-xxxiii.	B.M.: K.		
do.	1567, Mar. 10.	Rychard Tottel.	34	i-xxxiii.	B.M.: K.		
do.	1567, Nov. 22.	Rychard Tottel.	34	i-xxxiii.	B.: K.: L.I.		
37	1575, Nov. 22.	Rychard Tottel.	60	i blank + 54 leaves not	C.: E.		Collation imperfect.
do.	1575, Nov. 22.	Rychard Tottel.	34	i blank + 54 leaves not			
do.	1575, Nov. 22.	Rychard Tottel.	34	i blank + 54 leaves not			
do.	N. d. (@ 1482 ?).	N. n. (Machlinia ?).	41	Not folioed + 1 blank.	B.M.: L.I.		
do.	N. d.	Pynson.	41	Not folioed + 1 blank.	D.: H.: K.		
do.	N. d. (@ 1556 ?).	Rychard Tottel.	38	i-xxxviii.			

do...	1567...	Richard Tottil...	38	i-xxxviii	B.M.: K.: H.	With Pynson's device, No. 6, at end.
do...	1575, June 2	Richard Tottil...	38	xxxviii...	B.: K.: L.I.	
do...	1575, June 2	Richard Tottil...	38	xviii (error)...	B.M.: L.I.	
do...	1550...	Richard Tottil...	44	xxxviii (error)...	D.: H. K.: K.: H.	
do...	1556...	Richard Tottil...	40	(i)-xxxviii (error)...	F.: B.M.: K.: H.	
do...	1575, May 5...	Richard Tottil...	40	xviii...	K.: L.I.	
do...	1575, May 5...	Richard Tottil...	40	Not folioed...	B.M.: L.I.	
do...	1557...	Richard Tottil...	54	ii + i blank...	D.: H. K.: K.: H.	
do...	1557, May 17...	Richard Tottil...	52	ii + i blank...	D.: B.M.: K.: H.	
do...	1575, Dec. 14...	Richard Tottil...	52	ii + i blank...	B.M.: H.: K.: L.I.	
do...	1601...	Richard Tottil...	52	527 + 1 blank...	In general use...	
do...	1609...	Richard Tottil...	52	?	T.P.: C.R.: V.F.S.	Years 23 to 26 and 29 omitted.
do...	1609...	Richard Tottil...	52	?	Large folio T.P.:	do.
do...	1609...	Richard Tottil...	52	?	C.R.: Y.P.S.	Fragment only: 37 lines to a page.
do...	1609...	Richard Tottil...	52	?	Explicit am. Townsend.	
do...	1556, No. 2...	Richard Tottil...	10	i-x	K.	First line symbol: colophon first line
do...	1556, No. 2...	Richard Tottil...	10	i-x	K.: H.	Imprinted at London
do...	1556, No. 2...	Richard Tottil...	10	i-x	B.	First line symbol: colophon first line
do...	1556, No. 2...	Richard Tottil...	10	i-x	B.M.: D.: L.I.	Imprinted at London
do...	1556, No. 2...	Richard Tottil...	10	i-x	C.: D.: H.: L.I.	Imprinted at London
do...	1556, No. 2...	Richard Tottil...	10	i-x	B.: K.: L.I.	First line, no symbol: colophon first line.
do...	1556, No. 2...	Richard Tottil...	10	i-x	H.: K.	Imprinted at London
do...	1556, No. 2...	Richard Tottil...	10	i-x	D.	Imprinted at London
do...	1556, No. 2...	Richard Tottil...	10	i-x	D.: H.: L.I.	Imprinted at London
do...	1556, No. 2...	Richard Tottil...	10	i-x	B.M.	Full of printer's errors.
do...	1556, No. 2...	Richard Tottil...	10	i-x	B.M.	do.

¹ This Year begins "Michaëlis;" previous Years of this reign with "Trinitatis." A manuscript note found in a copy of the 1679 edition suggests that an early scribe or printer slipped a term of Year 31 into this year by mistake.

² Herbert says of this edition: "Mr. Ames had seen two or three of these; but all without name or place."

³ First line of colophon of No. 1 is "Imprinted at London;" "—" of No. 2, "Imprinted at Lon."

⁴ The catalogues conjecture *Machina* for both editions; but may not one of them be an early Pynson? Note difference in folios.

⁵ It is not clear, from information accessible, whether or not the Cambridge University and Exeter College copies are alike.

⁶ The words in the colophon, "newly corrected and amended," point to a previous edition of this Year.

⁷ Dedication by Robert Barnawal. References to Brooke and Fitzherbert. "Syntomoxia" or Table, with separate title-page. The *Syntomoxia* of 1601 was also issued separately, being sometimes bound up with a collection of Pynson's Year 2.

⁸ Perhaps this Year 1 was printed with Pynson's Year 2.

⁹ Are the D. and L. f. copies different? The D. copy is folioed i-xxviii; the L. f. collator reports folios i-xxx.

¹⁰ "De novo impressus," in colophon, indicates that the no-name date-date edition is earlier than Pynson's. There is some confusion in the collations, and possibly there were two n. a., n. d. editions, one earlier and one later than Pynson's.

REIGNAL YEARS.	WHEN PRINTED.	PRINTER.	LEAVES.	FOLIOS (OR PAGES).	WHERE FOUND.	TITLE-PAGES, ETC.	NOTES.
Edw. IV. 3.	1558.	Richard Tottell.	28	i-xxviii.	B.: K.		Colophon first line, ¶ Imprinted at Lon-
do.	1566, No. 1.	Richard Tottell.	28	i-xxviii.	B.: K.		Colophon first line, ¶ Imprinted at Lon-
do.	1566, No. 2.	Richard Tottell.	28	i-xxviii.	H.: K.		don in
do.	1583.	Rycharde Tottell.	28	i-xxviii.	K.: K.		
4.	N. d. (1515?)	Pyson.	46	Not folioed.	C.: D.: L.I.		
do.	N. d. (1520?)	N. n. (Pyson?)	50	Not folioed (last leaf blank).	D.: H.: L.I.		
do.	N. d.	Mydlyton.	48	i-xlvii + i blank.	B.M.		
do.	1558, No. 1.	Richard Tottell.	44	i-xliii.	B.: K.		Colophon first line, ¶ Imprinted at Lon-
do.	1558, No. 2.	Richard Tottell.	44	i-xliii.	B.: B.M.: K.		don in these strete within
do.	1558, No. 3.	Richard Tottell.	44	i-xliii.	H.: K.		Colophon first line, ¶ Imprinted at Lon-
do.	1583.	Rycharde Tottell.	44	i-xliii.	K.		don in
5.	N. d. ^a	N. n. (Pyson?)	12	Not folioed.	C.: D.: H.: L.I.		Short Report.
do.	N. d. (@ 1525?) ^a	N. n.	10	Not folioed.	B.M.: D.: L.I.		
do.	1557.	Richard Tottell.	8	i-viii.	B.M.: B.: K.		Colophon first line, ¶ Imprinted at Lon-
do.	1566, No. 1.	Richard Tottell.	8	i-viii.	B.: K.		Colophon first line, ¶ Imprinted at
do.	1566, No. 2.	Richard Tottell.	8	i-vi (error).	H.: K.		London in
do.	1584.	Rycharde Tottell.	8	i-viii.	K.: D.: L.I.		
6.	N. d. ³	N. n. (Pyson?)	13	Not folioed + i blank.	B.M.: H.: L.I.		
do.	N. d. ³	N. n.	13	Not folioed + i blank.	K.: B.M.: H.: L.I.		
do.	1556 ⁴	Rycharde Tottell.	12	i-xii.	K.: K.: H.		
do.	1557, No. 1.	Richard Tottell.	12	i-xii.	B.: K.: K.		Colophon first line, ¶ Imprinted at Lon-
do.	1557, No. 2.	Richard Tottell.	12	i-xii.	B.M.: K.		Colophon first line, ¶ Imprinted at
do.	1572 (* ⁵)	Rycharde Tottell.	12	i-xii.	H.: K.		London.
7.	N. d.	N. n. (Pyson?)	30	Not folioed.	D.: H.: L.I.		
do.	N. d. (@ 1515?)	Pyson.	30	Not folioed.	B.M.: D.		
do.	N. d.	Redman	30	Not folioed.	B.: B.M.: K.: L.I.		
do.	1556, Jan. 8.	Richard Tottell.	32	(i) xxxii.	B.: K.		
do.	1567, last day of Apr.	Richard Tottell.	32	(i) xxxii.	B.: K.: H.		
do.	No. 1.	Richard Tottell.	32	i-xxxii.	H.: K.		Colophon first line, ¶ Imprinted at Lon-
do.	1567, No. 2.	Richard Tottell.	32	i-xxxii.	K.		Colophon first line, ¶ Imprinted at
do.	1584.	Rycharde Tottell.	32	i-xxxii.	B.M.: L.I.		London in
8.	N. d. No. 1 (@ 1520?)	N. n. (Pyson?)	32	Not folioed.	D.: H.: L.I.		
do.	N. d. No. 2 (@ 1528?)	N. n. (Pyson?)	32	Not folioed.	D.: H.: L.I.		Back of last leaf, Pyson's device, No. 6.
do.	N. d.	Mydlyton.	30	Not folioed.	B.M.		Back of last leaf blank.
do.	1556, No. 1.	Richard Tottell.	26	i-xxv + i blank.	B.: K.		Colophon first line, ¶ Imprinted at
do.	1556, No. 2.	Richard Tottell.	26	i-xxv + i blank.	B.: B.M.: K.		Low
							Colophon first line, ¶ Imprinted at
							London.

do. 1556, No. 3.....	Richard Tottil.....	26	(i)-xxv + 1 blank.....	H. : K.	Colophon first line, ¶ Imprinted at London in
do. 1582, No. 1 ^a	Rycharde Totell.....	26	(i)-xxv + 1 blank.....	K.	First line (no symbol), De Termino Pasche.
do. 1583, No. 2 ^b	Rycharde Totell.....	26	i-xxv + 1 blank.....	K.	First line, ¶ De Termino Pasche.
9 do. N. d.	Pynson.....	27	Not folioed + 1 blank.....	B.M. : L.I.	Pynson's device, No. 1 (or 2) at end, Explicit Annus Nouus.
do. N. d.	Pynson.....	56	Not folioed.....	B.M.	No device. "Explicit annus ix."
do. N. d.	Kedman.....	58	i-iii + 1 blank.....	B.M. : D. : L.I.	
do. 1556, Jan. 25.....	Richard Totell.....	54	i-iii + 1 blank.....	B. : K. : H.	
do. 1556, Feb. 3.....	Richard Totell.....	54	i-iii + 1 blank.....	K. : K.	
do. 1572, July 24.....	Rycharde Totell.....	54	i-iii + 1 blank.....	H. : K.	
do. 1572, Aug. 24.....	Rycharde Totell.....	54	i-iii + 1 blank.....	B.M. : D. : K. : L.I.	First line, De termino Pach Anno decimo Edwardi quarto.
10 do. N. d. No. 1 (@ 1510?).....	N. n. (Kastell, or de Worde?).....	20	i-xx.....	D. : L.I.	First line, De termino Pasche Anno Decimo E. iii.
do. N. d. No. 2 (@ 1525?).....	N. n. (Pynson?).....	20	i-xx.....	B.M.	First line, De termino Pasche Anno Decimo E. iii.
do. N. d. (@ 1525).....	Pynson.....	22	i-xxii.....	B.M. : D. : L.I.	First line, De termino Pasche Anno Decimo E. iii.
11 do. N. d.	N. n. (Pynson?).....	13	Not folioed (+ 1 blank?).....	(T.P. : D.) ^a	Begins De termino sancte trinitatis Anno xi. E. iii. (one line) Pynson's device, No. 5, at end.
do. N. d.	Kedman.....	14	i-xiii (error).....	B.M. : D. : L.I.	
do. N. d.	Powell.....	14	i-xiii.....	K.	
12 do. N. d. (@ 1520?).....	Pynson.....	22	i-xxi + 1 blank.....	B.M. : L.I.	
do. N. d.	Kedman.....	22	i-xxi + 1 blank.....	D.	
do. N. d.	Powell.....	22	i-xxi + 1 blank.....	K.	
12 do. N. d. (1577*).....	Richard Tottil.....	52 ^a	Last leaf blank.....	K.	Colophon first line, ¶ Imprinted at London in
do. 1566, No. 1.....	Richard Tottil.....	52 ^a	Last leaf blank.....	B. : K. : H.	
do. 1566, No. 2.....	Richard Tottil.....	52 ^a	Last leaf blank.....	H. : K.	
do. 1564 ¹⁰	Rycharde Tottil.....	52 ^a	Last leaf blank.....	K.	
13 do. N. d. (@ 1518?).....	Pynson.....	10	x.....	D. M. : L.I.	
do. N. d.	Kedman.....	10	x.....	K.	
do. N. d.	Powell.....	10	x.....	K.	
do. 1559, Mar. 16.....	Richard Tottil.....	10	x.....	B. : K. : H.	
do. 1566, Aug. 16.....	Richard Tottil.....	10	x.....	K.	
do. 1572 (6%).....	Rycharde Totell.....	10	i-x.....	K.	

1 In this instance the variation between Nos. 1, 2, and 3 appears in spelling, symbols, and in length of first line of colophon.

2 Lower part of recto of 4th and 11th leaves, and the whole of verso of leaves 11 and 12, blank.

3 These copies of Years 5 and 6 seem to be assigned Myddelton or Kedmans.

4 The type of this 1550 colophon resembles Tottil's 1531-530 colophons, and is not like his other early prints.

5 The first eight leaves of these two prints are apparently identical; the other leaves are apparently different; the other leaves are apparently identical.

6 10 Folio IV and 49 Henry VI. "This was the year when Henry regained the throne for a brief period."

7 Printed in a small "superscript" type, like that of Kasian's (?) Liber Assurum, 1514. At end "¶ The price of this booke is. iii. ; d. un bounde."

8 The first printed leaf registers a. 11 E. IV, 1541; b. 11 E. V, 1542; c. 11 E. V, 1543; d. 11 E. V, 1544; e. 11 E. V, 1545; f. 11 E. V, 1546; g. 11 E. V, 1547; h. 11 E. V, 1548; i. 11 E. V, 1549; j. 11 E. V, 1550; k. 11 E. V, 1551; l. 11 E. V, 1552; m. 11 E. V, 1553; n. 11 E. V, 1554; o. 11 E. V, 1555; p. 11 E. V, 1556; q. 11 E. V, 1557; r. 11 E. V, 1558; s. 11 E. V, 1559; t. 11 E. V, 1560; u. 11 E. V, 1561; v. 11 E. V, 1562; w. 11 E. V, 1563; x. 11 E. V, 1564; y. 11 E. V, 1565; z. 11 E. V, 1566; aa. 11 E. V, 1567; ab. 11 E. V, 1568; ac. 11 E. V, 1569; ad. 11 E. V, 1570; ae. 11 E. V, 1571; af. 11 E. V, 1572; ag. 11 E. V, 1573; ah. 11 E. V, 1574; ai. 11 E. V, 1575; aj. 11 E. V, 1576; ak. 11 E. V, 1577; al. 11 E. V, 1578; am. 11 E. V, 1579; an. 11 E. V, 1580; ao. 11 E. V, 1581; ap. 11 E. V, 1582; aq. 11 E. V, 1583; ar. 11 E. V, 1584; as. 11 E. V, 1585; at. 11 E. V, 1586; au. 11 E. V, 1587; av. 11 E. V, 1588; aw. 11 E. V, 1589; ax. 11 E. V, 1590; ay. 11 E. V, 1591; az. 11 E. V, 1592; ba. 11 E. V, 1593; bb. 11 E. V, 1594; bc. 11 E. V, 1595; bd. 11 E. V, 1596; be. 11 E. V, 1597; bf. 11 E. V, 1598; bg. 11 E. V, 1599; bh. 11 E. V, 1600; bi. 11 E. V, 1601; bj. 11 E. V, 1602; bk. 11 E. V, 1603; bl. 11 E. V, 1604; bm. 11 E. V, 1605; bn. 11 E. V, 1606; bo. 11 E. V, 1607; bp. 11 E. V, 1608; bq. 11 E. V, 1609; br. 11 E. V, 1610; bs. 11 E. V, 1611; bt. 11 E. V, 1612; bu. 11 E. V, 1613; bv. 11 E. V, 1614; bw. 11 E. V, 1615; bx. 11 E. V, 1616; by. 11 E. V, 1617; bz. 11 E. V, 1618; ca. 11 E. V, 1619; cb. 11 E. V, 1620; cc. 11 E. V, 1621; cd. 11 E. V, 1622; ce. 11 E. V, 1623; cf. 11 E. V, 1624; cg. 11 E. V, 1625; ch. 11 E. V, 1626; ci. 11 E. V, 1627; cj. 11 E. V, 1628; ck. 11 E. V, 1629; cl. 11 E. V, 1630; cm. 11 E. V, 1631; cn. 11 E. V, 1632; co. 11 E. V, 1633; cp. 11 E. V, 1634; cq. 11 E. V, 1635; cr. 11 E. V, 1636; cs. 11 E. V, 1637; ct. 11 E. V, 1638; cu. 11 E. V, 1639; cv. 11 E. V, 1640; cw. 11 E. V, 1641; cx. 11 E. V, 1642; cy. 11 E. V, 1643; cz. 11 E. V, 1644; da. 11 E. V, 1645; db. 11 E. V, 1646; dc. 11 E. V, 1647; dd. 11 E. V, 1648; de. 11 E. V, 1649; df. 11 E. V, 1650; dg. 11 E. V, 1651; dh. 11 E. V, 1652; di. 11 E. V, 1653; dj. 11 E. V, 1654; dk. 11 E. V, 1655; dl. 11 E. V, 1656; dm. 11 E. V, 1657; dn. 11 E. V, 1658; do. 11 E. V, 1659; dp. 11 E. V, 1660; dq. 11 E. V, 1661; dr. 11 E. V, 1662; ds. 11 E. V, 1663; dt. 11 E. V, 1664; du. 11 E. V, 1665; dv. 11 E. V, 1666; dw. 11 E. V, 1667; dx. 11 E. V, 1668; dy. 11 E. V, 1669; dz. 11 E. V, 1670; ea. 11 E. V, 1671; eb. 11 E. V, 1672; ec. 11 E. V, 1673; ed. 11 E. V, 1674; ee. 11 E. V, 1675; ef. 11 E. V, 1676; eg. 11 E. V, 1677; eh. 11 E. V, 1678; ei. 11 E. V, 1679; ej. 11 E. V, 1680; ek. 11 E. V, 1681; el. 11 E. V, 1682; em. 11 E. V, 1683; en. 11 E. V, 1684; eo. 11 E. V, 1685; ep. 11 E. V, 1686; eq. 11 E. V, 1687; er. 11 E. V, 1688; es. 11 E. V, 1689; et. 11 E. V, 1690; eu. 11 E. V, 1691; ev. 11 E. V, 1692; ew. 11 E. V, 1693; ex. 11 E. V, 1694; ey. 11 E. V, 1695; ez. 11 E. V, 1696; fa. 11 E. V, 1697; fb. 11 E. V, 1698; fc. 11 E. V, 1699; fd. 11 E. V, 1700; fe. 11 E. V, 1701; ff. 11 E. V, 1702; fg. 11 E. V, 1703; fh. 11 E. V, 1704; fi. 11 E. V, 1705; fj. 11 E. V, 1706; fk. 11 E. V, 1707; fl. 11 E. V, 1708; fm. 11 E. V, 1709; fn. 11 E. V, 1710; fo. 11 E. V, 1711; fp. 11 E. V, 1712; fq. 11 E. V, 1713; fr. 11 E. V, 1714; fs. 11 E. V, 1715; ft. 11 E. V, 1716; fu. 11 E. V, 1717; fv. 11 E. V, 1718; fw. 11 E. V, 1719; fx. 11 E. V, 1720; fy. 11 E. V, 1721; fz. 11 E. V, 1722; ga. 11 E. V, 1723; gb. 11 E. V, 1724; gc. 11 E. V, 1725; gd. 11 E. V, 1726; ge. 11 E. V, 1727; gf. 11 E. V, 1728; gh. 11 E. V, 1729; gi. 11 E. V, 1730; gj. 11 E. V, 1731; gk. 11 E. V, 1732; gl. 11 E. V, 1733; gm. 11 E. V, 1734; gn. 11 E. V, 1735; go. 11 E. V, 1736; gp. 11 E. V, 1737; gq. 11 E. V, 1738; gr. 11 E. V, 1739; gs. 11 E. V, 1740; gt. 11 E. V, 1741; gu. 11 E. V, 1742; gv. 11 E. V, 1743; gw. 11 E. V, 1744; gx. 11 E. V, 1745; gy. 11 E. V, 1746; gz. 11 E. V, 1747; ha. 11 E. V, 1748; hb. 11 E. V, 1749; hc. 11 E. V, 1750; hd. 11 E. V, 1751; he. 11 E. V, 1752; hf. 11 E. V, 1753; hg. 11 E. V, 1754; hh. 11 E. V, 1755; hi. 11 E. V, 1756; hj. 11 E. V, 1757; hk. 11 E. V, 1758; hl. 11 E. V, 1759; hm. 11 E. V, 1760; hn. 11 E. V, 1761; ho. 11 E. V, 1762; hp. 11 E. V, 1763; hq. 11 E. V, 1764; hr. 11 E. V, 1765; hs. 11 E. V, 1766; ht. 11 E. V, 1767; hu. 11 E. V, 1768; hv. 11 E. V, 1769; hw. 11 E. V, 1770; hx. 11 E. V, 1771; hy. 11 E. V, 1772; hz. 11 E. V, 1773; ia. 11 E. V, 1774; ib. 11 E. V, 1775; ic. 11 E. V, 1776; id. 11 E. V, 1777; ie. 11 E. V, 1778; if. 11 E. V, 1779; ig. 11 E. V, 1780; ih. 11 E. V, 1781; ii. 11 E. V, 1782; ij. 11 E. V, 1783; ik. 11 E. V, 1784; il. 11 E. V, 1785; im. 11 E. V, 1786; in. 11 E. V, 1787; io. 11 E. V, 1788; ip. 11 E. V, 1789; iq. 11 E. V, 1790; ir. 11 E. V, 1791; is. 11 E. V, 1792; it. 11 E. V, 1793; iu. 11 E. V, 1794; iv. 11 E. V, 1795; iw. 11 E. V, 1796; ix. 11 E. V, 1797; iy. 11 E. V, 1798; iz. 11 E. V, 1799; ja. 11 E. V, 1800; jb. 11 E. V, 1801; jc. 11 E. V, 1802; jd. 11 E. V, 1803; je. 11 E. V, 1804; jf. 11 E. V, 1805; jg. 11 E. V, 1806; jh. 11 E. V, 1807; ji. 11 E. V, 1808; jj. 11 E. V, 1809; jk. 11 E. V, 1810; jl. 11 E. V, 1811; jm. 11 E. V, 1812; jn. 11 E. V, 1813; jo. 11 E. V, 1814; jp. 11 E. V, 1815; jq. 11 E. V, 1816; jr. 11 E. V, 1817; js. 11 E. V, 1818; jt. 11 E. V, 1819; ju. 11 E. V, 1820; jv. 11 E. V, 1821; jw. 11 E. V, 1822; jx. 11 E. V, 1823; jy. 11 E. V, 1824; jz. 11 E. V, 1825; ka. 11 E. V, 1826; kb. 11 E. V, 1827; kc. 11 E. V, 1828; kd. 11 E. V, 1829; ke. 11 E. V, 1830; kf. 11 E. V, 1831; kg. 11 E. V, 1832; kh. 11 E. V, 1833; ki. 11 E. V, 1834; kj. 11 E. V, 1835; kl. 11 E. V, 1836; km. 11 E. V, 1837; kn. 11 E. V, 1838; ko. 11 E. V, 1839; kp. 11 E. V, 1840; kq. 11 E. V, 1841; kr. 11 E. V, 1842; ks. 11 E. V, 1843; kt. 11 E. V, 1844; ku. 11 E. V, 1845; kv. 11 E. V, 1846; kw. 11 E. V, 1847; kx. 11 E. V, 1848; ky. 11 E. V, 1849; kz. 11 E. V, 1850; la. 11 E. V, 1851; lb. 11 E. V, 1852; lc. 11 E. V, 1853; ld. 11 E. V, 1854; le. 11 E. V, 1855; lf. 11 E. V, 1856; lg. 11 E. V, 1857; lh. 11 E. V, 1858; li. 11 E. V, 1859; lj. 11 E. V, 1860; lk. 11 E. V, 1861; ll. 11 E. V, 1862; lm. 11 E. V, 1863; ln. 11 E. V, 1864; lo. 11 E. V, 1865; lp. 11 E. V, 1866; lq. 11 E. V, 1867; lr. 11 E. V, 1868; ls. 11 E. V, 1869; lt. 11 E. V, 1870; lu. 11 E. V, 1871; lv. 11 E. V, 1872; lw. 11 E. V, 1873; lx. 11 E. V, 1874; ly. 11 E. V, 1875; lz. 11 E. V, 1876; ma. 11 E. V, 1877; mb. 11 E. V, 1878; mc. 11 E. V, 1879; md. 11 E. V, 1880; me. 11 E. V, 1881; mf. 11 E. V, 1882; mg. 11 E. V, 1883; mh. 11 E. V, 1884; mi. 11 E. V, 1885; mj. 11 E. V, 1886; mk. 11 E. V, 1887; ml. 11 E. V, 1888; mm. 11 E. V, 1889; mn. 11 E. V, 1890; mo. 11 E. V, 1891; mp. 11 E. V, 1892; mq. 11 E. V, 1893; mr. 11 E. V, 1894; ms. 11 E. V, 1895; mt. 11 E. V, 1896; mu. 11 E. V, 1897; mv. 11 E. V, 1898; mw. 11 E. V, 1899; mx. 11 E. V, 1900; my. 11 E. V, 1901; mz. 11 E. V, 1902; na. 11 E. V, 1903; nb. 11 E. V, 1904; nc. 11 E. V, 1905; nd. 11 E. V, 1906; ne. 11 E. V, 1907; nf. 11 E. V, 1908; ng. 11 E. V, 1909; nh. 11 E. V, 1910; ni. 11 E. V, 1911; nj. 11 E. V, 1912; nk. 11 E. V, 1913; nl. 11 E. V, 1914; nm. 11 E. V, 1915; nn. 11 E. V, 1916; no. 11 E. V, 1917; np. 11 E. V, 1918; nq. 11 E. V, 1919; nr. 11 E. V, 1920; ns. 11 E. V, 1921; nt. 11 E. V, 1922; nu. 11 E. V, 1923; nv. 11 E. V, 1924; nw. 11 E. V, 1925; nx. 11 E. V, 1926; ny. 11 E. V, 1927; nz. 11 E. V, 1928; oa. 11 E. V, 1929; ob. 11 E. V, 1930; oc. 11 E. V, 1931; od. 11 E. V, 1932; oe. 11 E. V, 1933; of. 11 E. V, 1934; og. 11 E. V, 1935; oh. 11 E. V, 1936; oi. 11 E. V, 1937; oj. 11 E. V, 1938; ok. 11 E. V, 1939; ol. 11 E. V, 1940; om. 11 E. V, 1941; on. 11 E. V, 1942; oo. 11 E. V, 1943; op. 11 E. V, 1944; oq. 11 E. V, 1945; or. 11 E. V, 1946; os. 11 E. V, 1947; ot. 11 E. V, 1948; ou. 11 E. V, 1949; ov. 11 E. V, 1950; ow. 11 E. V, 1951; ox. 11 E. V, 1952; oy. 11 E. V, 1953; oz. 11 E. V, 1954; pa. 11 E. V, 1955; pb. 11 E. V, 1956; pc. 11 E. V, 1957; pd. 11 E. V, 1958; pe. 11 E. V, 1959; pf. 11 E. V, 1960; pg. 11 E. V, 1961; ph. 11 E. V, 1962; pi. 11 E. V, 1963; pj. 11 E. V, 1964; pk. 11 E. V, 1965; pl. 11 E. V, 1966; pm. 11 E. V, 1967; pn. 11 E. V, 1968; po. 11 E. V, 1969; pp. 11 E. V, 1970; pq. 11 E. V, 1971; pr. 11 E. V, 1972; ps. 11 E. V, 1973; pt. 11 E. V, 1974; pu. 11 E. V, 1975; pv. 11 E. V, 1976; pw. 11 E. V, 1977; px. 11 E. V, 1978; py. 11 E. V, 1979; pz. 11 E. V, 1980; qa. 11 E. V, 1981; qb. 11 E. V, 1982; qc. 11 E. V, 1983; qd. 11 E. V, 1984; qe. 11 E. V, 1985; qf. 11 E. V, 1986; qg. 11 E. V, 1987; qh. 11 E. V, 1988; qi. 11 E. V, 1989; qj. 11 E. V, 1990; qk. 11 E. V, 1991; ql. 11 E. V, 1992; qm. 11 E. V, 1993; qn. 11 E. V, 1994; qo. 11 E. V, 1995; qp. 11 E. V, 1996; qq. 11 E. V, 1997; qr. 11 E. V, 1998; qs. 11 E. V, 1999; qt. 11 E. V, 2000; qu. 11 E. V, 2001; qv. 11 E. V, 2002; qw. 11 E. V, 2003; qx. 11 E. V, 2004; qy. 11 E. V, 2005; qz. 11 E. V, 2006; ra. 11 E. V, 2007; rb. 11 E. V, 2008; rc. 11 E. V, 2009; rd. 11 E. V, 2010; re. 11 E. V, 2011; rf. 11 E. V, 2012; rg. 11 E. V, 2013; rh. 11 E. V, 2014; ri. 11 E. V, 2015; rj. 11 E. V, 2016; rk. 11 E. V, 2017; rl. 11 E. V, 2018; rm. 11 E. V, 2019; rn. 11 E. V, 2020; ro. 11 E. V, 2021; rp. 11 E. V, 2022; rq. 11 E. V, 2023; rr. 11 E. V, 2024; rs. 11 E. V, 2025; rt. 11 E. V, 2026; ru. 11 E. V, 2027; rv. 11 E. V, 2028; rw. 11 E. V, 2029; rx. 11 E. V, 2030; ry. 11 E. V, 2031; rz. 11 E. V, 2032; sa. 11 E. V, 2033; sb. 11 E. V, 2034; sc. 11 E. V, 2035; sd. 11 E. V, 2036; se. 11 E. V, 2037; sf. 11 E. V, 2038; sg. 11 E. V, 2039; sh. 11 E. V, 2040; si. 11 E. V, 2041; sj. 11 E. V, 2042; sk. 11 E. V, 2043; sl. 11 E. V, 2044; sm. 11 E. V, 2045; sn. 11 E. V, 2046; so. 11 E. V, 2047; sp. 11 E. V, 2048; sq. 11 E. V, 2049; sr. 11 E. V, 2050; ss. 11 E. V, 2051; st. 11 E. V, 2052; su. 11 E. V, 2053; sv. 11 E. V, 2054; sw. 11 E. V, 2055; sx. 11 E. V, 2056; sy. 11 E. V, 2057; sz. 11 E. V, 2058; ta. 11 E. V, 2059; tb. 11 E. V, 2060; tc. 11 E. V, 2061; td. 11 E. V, 2062; te. 11 E. V, 2063; tf. 11 E. V, 2064; tg. 11 E. V, 2065; th. 11 E. V, 2066; ti. 11 E. V, 2067; tj. 11 E. V, 2068; tk. 11 E. V, 2069; tl. 11 E. V, 2070; tm. 11 E. V, 2071; tn. 11 E. V, 2072; to. 11 E. V, 2073; tp. 11 E. V, 2074; tq. 11 E. V, 2075; tr. 11 E. V, 2076; ts. 11 E. V, 2077; tt. 11 E. V, 2078; tu. 11 E. V, 2079; tv. 11 E. V, 2080; tw. 11 E. V, 2081; tx. 11 E. V, 2082; ty. 11 E. V, 2083; tz. 11 E. V, 2084; ua. 11 E. V, 2085; ub. 11 E. V, 2086; uc. 11 E. V, 2087; ud. 11 E. V, 2088; ue. 11 E. V, 2089; uf. 11 E. V, 2090; ug. 11 E. V, 2091; uh. 11 E. V, 2092; ui. 11 E. V, 2093; uj. 11 E. V, 2094; uk. 11 E. V, 2095; ul. 11 E. V, 2096; um. 11 E. V, 2097; un. 11 E. V, 2098; uo. 11 E. V, 2099; up. 11 E. V, 2100; uq. 11 E. V, 2101; ur. 11 E. V, 2102; us. 11 E. V, 2103; ut. 11 E. V, 2104; uu. 11 E. V, 2105; uv. 11 E. V, 2106; uw. 11 E. V, 2107; ux. 11 E. V, 2108; uy. 11 E. V, 2109; uz. 11 E. V, 2110; va. 11 E. V, 2111; vb. 11 E. V, 2112; vc. 11 E. V, 2113; vd. 11 E. V, 2114; ve. 11 E. V, 2115; vf. 11 E. V, 2116; vg. 11 E. V, 2117; vh. 11 E. V, 2118; vi. 11 E. V, 2119; vj. 11 E. V, 2120; vk. 11 E. V, 2121; vl. 11 E. V, 2122; vm. 11 E. V, 2123; vn. 11 E. V, 2124; vo. 11 E. V, 2125; vp. 11 E. V, 2126; vq. 11 E. V, 2127; vr. 11 E. V, 2128; vs. 11 E. V, 2129; vt. 11 E. V, 2130; vu. 11 E. V, 2131; vv. 11 E. V, 2132; vw. 11 E. V, 2133; vx. 11 E. V, 2134; vy. 11 E. V, 2135; vz. 11 E. V, 2136; wa. 11 E. V, 2137; wb. 11 E. V, 2138; wc. 11 E. V, 2139; wd. 11 E. V, 2140; we. 11 E. V, 2141; wf. 11 E. V, 2142; wg. 11 E. V, 2143; wh. 11 E. V, 2144; wi. 11 E. V, 2145; wj. 11 E. V, 2146; wk. 11 E. V, 2147; wl. 11 E. V, 2148; wm. 11 E. V, 2149; wn. 11 E. V, 2150; wo. 11 E. V, 2151; wp. 11 E. V, 2152; wq. 11 E. V, 2153; wr. 11 E. V, 2154; ws. 11 E. V, 2155; wt. 11 E. V, 2156; wu. 11 E. V, 2157; wv. 11 E. V, 2158; ww. 11 E. V, 2159; wx. 11 E. V, 2160; wy. 11 E. V, 2161; wz. 11 E. V, 2162; xa. 11 E. V, 2163; xb. 11 E. V, 2164; xc. 11 E. V, 2165; xd. 11 E. V, 2166; xe. 11 E. V, 2167; xf. 11 E. V, 2168; xg. 11 E. V, 2169; xh. 11 E. V, 2170; xi. 11 E. V, 2171; xj. 11 E. V, 2172; xk. 11 E. V, 2173; xl. 11 E. V, 2174; xm. 11 E. V, 2175; xn. 11 E. V, 2176; xo. 11 E. V, 2177; xp. 11 E. V, 2178; xq. 11 E. V, 2179; xr. 11 E. V, 2180; xs. 11 E. V, 2181; xt. 11 E. V, 2182; xu. 11

REGNAL YEARS.	WHEN PRINTED.	PRINTER.	LEAVES.	FOLIOS (OR PAGES).	WHERE FOUND.	TITLE-PAGES, ETC.	NOTE.
Edw. IV. 13.	1582, June 12 ¹	Richard Tottell...	10	i-x	H: K.		
do. 14.	N. d. (@ 1525?)	Pynson...	8	i-viii	B.M.: D.: L.I.		
do.	N. d.	Richard Tottell...	8	i-viii	B.M.: L.I.		An early Tottell?
do.	1556	Richard Tottell...	8	i-viii	B.: H.: K.		
do.	1572 (6s)	Richard Tottell...	8	i-viii	K.: K.		
do.	1582, June 12	Richard Tottell...	8	i-viii	H.: K.		
do.	N. d. (@ 1525?)	Pynson...	32	Not folioed.	D.: L.I.		
do.	N. d.	Richard Tottell...	32	i-xxxii	B.M.		
do.	1556, Feb. 2, No. 1	Richard Tottell...	34	i-xxxiii + i blank.	B.: K.		
do.	1556, Feb. 2, No. 2	Richard Tottell...	34	i-xxxiii + i blank.	B.: H.		
do.	1572 (6s)	Richard Tottell...	34	i-xxxiii + i blank.	K.: K.		
do.	1582, June 12	Richard Tottell...	34	i-xxxiii + i blank.	H.: K.		
do.	N. d. (@ 1520?)	Pynson...	12	Not folioed.	B.M.: L.I.		
do.	N. d.	Richard Tottell...	12	i-xii	D.		Pynson's device, No. 6, at end.
do.	1556, No. 1.	Richard Tottell...	12	i-xii	B.: K.		Colophon, first line, C Imprinted at London.
do.	1556, No. 2.	Richard Tottell...	12	i-xii	H.: K.		Colophon, first line, C Imprinted at London in
do.	1557	Richard Tottell...	12	i-xii	B.: K.		
do.	1583	Richard Tottell...	12	i-xii	K.M.: D.: L.I.		
do.	N. d.	Richard Tottell...	8	i-viii	B.M.: D.: L.I.		
do.	N. d.	Pynson...	8	i-viii	L.I.		Pynson's device, No. 6, at end.
do.	1557, No. 1	Richard Tottell...	8	i-viii	B.: B.M.: K.		
do.	1557, No. 2	Richard Tottell...	8	i-viii	B.: K.		First line, C De Termino Pasche (etc.)
do.	1557, No. 3	Richard Tottell...	8	i-viii	H.: K.		First line, C De Termino Pasche (etc.)
do.	1572 (6s)	Richard Tottell...	8	i-viii	K.: K.		First line, C De Termino Pasche (etc.)
do.	1583	Richard Tottell...	8	i-viii	H.: K.		
do.	N. d. (@ 1525?)	Pynson...	32	Not folioed.	B.M.: D.: L.I.		
do.	N. d.	Richard Tottell...	32	i-xxx + i blank.	B.M.		
do.	N. d.	Richard Tottell...	30	i-xxix (error).	B.: B.M.: K.		
do.	1556, Jan. 25	Richard Tottell...	30	i-xxix (error).	B.: K.		
do.	1572 (6s)	Richard Tottell...	30	i-xxix	H.: K.		
do.	N. d.	Richard Tottell...	30	i-xxix	H.: K.		
do.	N. d. (@ 1525?)	Pynson...	10	Not folioed.	B.M.: D.: L.I.		
do.	1527, No. 1	Richard Tottell...	12	i-xi + i blank.	B.M.		
do.	1556, No. 1.	Richard Tottell...	10	(i)-x	B.: K.		Colophon first line, C Imprinted at London.
do.	1556, No. 2.	Richard Tottell...	10	i-x	B.: B.M.: K.		Colophon first line, C Imprinted at London.
do.	1556, No. 3.	Richard Tottell...	10	(i)-x	K.		Colophon first line, C Imprinted at London.
do.	1556, No. 4.	Richard Tottell...	10	(i)-x	H.: K.		Colophon first line, C Imprinted at London.
do.	N. d. (@ 1520?)	Pynson...	18	Not folioed.	B.M.: L.I.		
do.	N. d.	Richard Tottell...	18	i-xviii	D.: L.I.		

do...	1556, No. 1.	Richard Tottell...	20	i-xix + 1 blank.	B.	Colophon first line, Imprinted at Lon.
do...	1556, No. 2.	Richard Tottell...	20	i-xiii (error) + 1 blank.	B. : B.M. : K.	Colophon first line, Imprinted at London.
do...	1556, No. 3.	Richard Tottell...	20	i-xix + 1 blank.	K.	Colophon first line, Imprinted at London in
do...	N. d.	Richard Tottell...	20	i-xix + 1 blank.	B. : H. : K.	Pynson's device, No. 6, on last leaf.
do...	1582.	Rycharde Tottell...	20	i-xix + 1 blank.	H. : K.	
do...	N. d. (@ 1530 ?).	Pynson...	20	i-xix + 1 blank.	B.M. : L.I.	
21 ^a .	N. d.	Kelnan...	102	i-Ci + 1 not folioed.	B.M. : D. : L.I.	Colophon first line, Imprinted at London in
do...	N. d.	Rycharde Tottell...	102	i-Ci + 1 blank.	B.M. : K.	
do...	N. d.	Rycharde Tottell...	84	i-lxxxiii.	B. : K.	
do...	1566, No. 1 ^a .	Richard Tottell...	84	i-lxxxiii.	H. : K.	Begins, De termino Pasche. Anno X ⁱⁱ Edwardi quarti.
do...	1566, No. 2.	Rycharde Tottell...	84	i-lxxxiii.	K.	
do...	1584 ^b .	Pynson...	84	i-lxxxiii (error).	B.M. : D. : L.I.	
22.	N. d. No. 1.	Pynson...	50	Not folioed.	B.M. : L.I.	Colophon first line, Imprinted at London
do...	N. d. No. 2.	Pynson...	50	Not folioed.	B.M.	
do...	N. d.	Myddylton...	50	i-l.	B. : K.	
do...	1556, Feb. 8, No. 1.	Richard Tottell...	52	i-li + 1 blank.	B. : B.M. : K.	Colophon first line, Imprinted at London
do...	1556, Feb. 8, No. 2.	Richard Tottell...	52	i-li + 1 blank.	H. : K.	
do...	1572.	Richard Tottell...	52	i-li + 1 blank.	K.	
do...	1578.	Rycharde Tottell...	52	i-li + 1 blank.	A.S. : B.M. : H. : K.	Large folio : T.P. : C.R. : Y.P.S.
do...	1580.	Rycharde Tottell...	52	i-li + 1 blank.	H. : K.	
do...	1590 ^c .	Wright & Norton...	?	?	?	
1-22.	1590 ^d .	Flesher & Young (Assigns of More)	?	?	In general use.	T.P. : C.R. : Y.P.S.
do...	1640 ^e .	Various printers...	?	?	D. : K.	
do...	1679 ^f .	Powell...	143	i-Cxlii.	A.S. : B.M. : H. : K.	
Long Quinto.	1553 ^g .	T.p. Richard Tottell.	143	i-143.		
do...	1587 ^h .	Colo. Rycharde Tottell.	143			

¹ A second copy of the 1556 edition, in Mr. Kellen's collection, misprints Anno ix. for xiii in the second line of the first page, the two copies being otherwise apparently identical. This looks as if the printer had been stopped and the error corrected, after some copies had been printed.

² The colophon says, "I wouler impressen," which indicates an earlier edition, not here recorded.

³ In No. 3, part of the first line on the last page is repeated from the previous page.

⁴ Another copy in Mr. Kellen's collection has eighty pages of the 1584 edition, and the last four pages, with colophon, of the 1566, No. 1, edition.

⁵ Called in Pynson's colophon "the long report" of this year.

⁶ References to Brooke's & others' Liours.

⁷ A memorandum as to this edition, without further particulars, is received from England just in time for insertion here.

⁸ The words "Long Report" of s. Edward IV. Nowe fyrste imprynted. ⁹ "Notations" to Brooke, Fitzherbert, etc.

¹⁰ The words "Long Report" or "Long Quinto" are not used in this edition.

¹¹ "Le longe Report" or "nouvelment imprimee & corrigee" "ouesque references al Abridgment de las cases in Brooke." Tottell perpetrates a practical pun in making this book "longer" or taller than his other Year Books.

REGNAL YEARS.	WHEN PRINTED.	PRINTER.	LEAVES.	FOLIOS (OR PAGES).	WHERE FOUND.	TITLE-PAGES, ETC.	NOTES.
Edw. IV.	1638.....	Assignes of John More	142	i-142.....	H.: K.....	T.P.	
Long Quinto.	1681.....	Various printers.	72	i-142 pages.....	In general use.....	T.P.	No other particulars.
Edw. V.	N. d. (@ 1500 ?).....	N. n.	72	?	B. n.		Pynson's device, No. 2, at end.
do.	1558.....	Rychard Tottell	8	Not folioed.....	B. n.		Colophon first line, ♀ Imprinted at Lon-
do.	1550, Sept. 12, No. 1.....	Rychard Tottell	8	Not folioed.....	K.....		Colophon first line, ♀ Imprinted at
do.	1559, Sept. 12, No. 2.....	Richard Tottell	8	Not folioed.....	K.....		London
do.	1568.....	Richard Tottell	8	i-viii.....	B.: H.....		Woodcut on title-page, and Pynson's
do.	1595.....	Richard Tottell	8	i-viii.....	B.: K.....		device, No. 6, at end.
Rich. III.	N. d. ^a	N. n. (Rastell ?).....	12	Not folioed.....	L. l.	T. P.: C. R.	Colophon first line, ♀ Imprinted at
do.	N. d.	Redman	6	T. p. and i-v.....	L. l.		Colophon first line, ♀ Imprinted at
do.	N. d. No. 1. ^a	Richard Tottell	4	i-iii.....	B.: K.....		London
do.	N. d. No. 2.....	Richard Tottell	4	i-iii.....	H.: K.....		
do.	1574, Dec. 6.....	Rychard Tottell	4	i-iii.....	B. n.: H.....		
do.	1574, Mar. 16.....	Rychard Tottell	4	i-iii.....	B.		
do.	N. d. (@ 1500 ?).....	N. n. (Tottell ?).....	4	i-iii.....	K.....		
do.	N. d.	N. n. (Rastell ?).....	22	Not folioed, first leaf blank.....	B. n.: D.....		
do.	N. d.	Pynson	22	i-xxii.....	L. l.		Colophon first line, ♀ Imprinted at
do.	N. d. No. 1. ^a	Richard Tottell	22	i-xxii.....	B.: K.....		Lon-
do.	N. d. No. 2.....	Richard Tottell	22	i-xxii.....	H.: K.....		Colophon first line, ♀ Imprinted at
do.	1574, Dec. 16.....	Rychard Tottell	22	i-xxii.....	B. n.: H.....		London.
do.	1574, Mar. 16.....	Rychard Tottell	22	i-xxii.....	B. n.: H.....		
do.	1587.....	Richard Tottell	22	i-22.....	D.....		
Hen. VII. 1-8	N. d. (@ 1505 ?).....	N. d. (Pynson ?).....	130	Not folioed.....	L. l.	C. R.: C. R.: V. F. S.	Pynson's device, No. 6, at end.
do.	N. d.	Redman	162	i-xxvi.....	L. l.	T. P.: C. R.: V. F. S.	
do.	N. d.	Pynson	26	i-xxvi.....	L. l.		
[Gap]	N. d.	Pynson	28	i-xxviii.....	L. l.		
[Gap]	N. d.	Herthelet	34	i-xxviii.....	L. l.		
[Gap]	1529, Nov. 7.....	Herthelet	38	i-xxviii.....	L. l.		
[Gap]	N. d.	Herthelet	38	i-xxviii.....	L. l.		
[Gap]	N. d.	Redman	44	i-xxviii.....	L. l.		Pynson's device, No. 6, at end.
1-21 ^a .	1555, Sept. 12, No. 1.....	Richard Tottell	?	i-xxviii.....	L. l.	T. P.: C. R.: V. F. S.	Colophon first line, ♀ Imprinted at Lon-
do.	1555, Sept. 12, No. 2 ^a	Rychard Tottell	?	i-xxviii.....	H.: K.....	T. P.: C. R.: V. F. S.	Colophon first line, ♀ Imprinted at
do.			?	i-xxviii.....	H.: K.....		London.

do...	1555, Sept. 12, No. 3 ⁴ .	Rycharde Tottell... T.p. Richard Tottell.	?	?	K.: L.I.	T.P.: C.R.: V.F.S.	Colophon first line, C Imprinted at London.
do...	T.p. 1555: colo. 1567...	Colo. Richard Tottell.	?	?	B.: H.	T.P.: C.R.: V.F.S.	No other particulars given.
do...	T.p. 1565: colo. 1580...	Total, spelling not noticed.	?	?	D.		
do...	T.p. 1585 ⁵ : colo. 1583...	T.p. Richard Tottell. Colo. Richard Tottell.	?	?	B.: B.M.: K.	T.P.: C.R.: V.F.S.	Small duodecimo.
Abridgment of Henry VII. [Cap.]	1614...	Co. of Stationers...	?	Not folioed...	B.M.: K.	T.P.: C.R.	
12, 13 and 14	1556 ¹ ...	Redman...	16	i-xv + 1 blank...	L.I.	C.R. & F.	
do...	1556 ² ...	Powell...	18	i-xviii...	B.M.		
do...	1556 ³ ...	Pyssom...	30	Not folioed...	L.I.		
do...	1540...	Redman...	32	Not folioed...	B.M.		
do...	1556 ⁴ ...	Rycharde Tottell...	48	{ 12 and 13, i-xvi... }	B.: B.M.		
do...	1560, No. 1 ⁷ ...	Rycharde Tottell...	48	do.	H.: K.		Colophon begins with symbol T.
do...	1560, No. 2 ⁷ ...	Rycharde Tottell...	48	do.	K.		Colophon begins with symbol C.
do...	1560 ⁷ ...	Richard Tottell...	48	do.	B.: K.		
do...	1569 ⁷ ...	Richard Tottell...	48	do.	H.		
do...	1570 ⁷ ...	Rycharde Tottell...	48	do.	B.M.		
[Cap.]	1570 ⁷ ...	Myddylton...	14	i-xiv...	B.M.		
18 and 19	N. d.	Richard Tottell...	14	i-xiv...	K.: H.	C.R. & F.	First line, De Termino Michaelis.
do...	N. d. No. 1 (6 ²)...	Richard Tottell...	14	i-xviii...	K.	C.R. & F.	First line, De Termino.
do...	N. d. No. 2 (15 ²)*...	Richard Tottell...	14	i-xviii...	B.: B.M.	C.R. & F.	
do...	1556...	Rycharde Tottell...	14	i-xviii...	B.: K.	C.R. & F.	
do...	1566...	Rycharde Tottell...	14	i-xviii...	H.	C.R. & F.	
do...	1567...	Rycharde Tottell...	14	(i)-xviii...	B.M.	C.R. & F.	
do...	1570...	Rycharde Tottell...	14	i-xiv...	H.	C.R. & F.	
[Cap.]	1570 ⁷ ...	Myddylton...	12	i-xii...	B.M.		
26...	N. d.	Richard Tottell...	10	i-x...	H.: K.		Colophon first line, C Imprinted at Lon-

¹ The title-page says "commemnet Appelle Long Quinto,"—herein so called for the first time.

² Woodcuts on recto and verso of first leaf. On verso of ninth leaf, a title-page for 1 Rich. III. with woodcut and engraved border.

³ The 1 and 2 Richard III. are so nearly uniform in typographical particulars, that they would seem to have been issued together in all these editions. But they have separate folios and colophons, and a difference of date (Dec. 6 and 16) will be noted in the 1574 imprints.

⁴ The title-page of each of the three 1555 editions says: "Annus primus & secundus de nova & valde bona collatione, Ac etiam, Annus decimus, undecimus, Decimus tertius, Decimus sextus & Vigessimus, nunquam ante hac editi." Years 17, 18, and 19 are omitted. The title-page is the same (imprint, Richard Tottell, 1555) in all three impressions.

⁵ Still another copy of the 1555 Henry VII. in Mr. Kellen's collection, differs from No. 2 in signature A,—but in no other particular, so far as appears from a rather hasty collation.

⁶ The title-page calls for the first to the twenty-second Year, but Year 21 is the last one included in the volume.

⁷ Years 12 and 13 have one register and numbering: Year 14 is separately registered and numbered. A catchword at the bottom of fol. xvi connects the 12 and 13 with 14. There is only one colophon for the three years.

REGINAL YEARS.	WHEN PRINTED.	PRINTER.	LEAVES.	FOLIOS (OR PAGES).	WHERE FOUND.	TITLE-PAGES, ETC.	NOTES.
Hen. VIII. 26	1536. No. 2.	Rycharde Tottell ..	10	1-x.	B.: B.M.	.....	Colophon first line (symbol not near 4 by the collator), Imprinted at London.
do. 1559.	Feb. 4.	Richard Tottyll ..	10	1-x.	K.	.....
do. 1560.		Richard Tottell ..	10	1-x.	B.: K.	.....
do. 1567 (6°).		Rycharde Tottell ..	10	(1)-x.	H.	.....
do. 1579.		Rycharde Tottell ..	10	1-x.	B.M.	.....
27 N. d.		Medyllton ..	36	1-xxxvi.	B.M.	.....
do. 1566, Feb. 8, No. 1.		Richard Tottell ..	30	1-xxx.	H.: K.	.....	Colophon first line, "Imprinted at London."
do. 1556, Feb. 8, No. 2.		Richard Tottyll ..	30	1-xxx.	K.	.....	Colophon first line, "Imprinted at London."
do. 1566, Aug. 8.		Richard Tottell ..	30	(1)-xxx.	B.: K.	.....
do. 1579.		Rycharde Tottell ..	30	1-xxx.	H.	.....
do. 1583.		Rycharde Tottell ..	30	1-xxx.	B.: B.M.	.....
12-27	1591.	{ T. p. Richard Tottell. Colo. Rycharde Tottyll.	?	?	K.	.....	Years 12 and 13, 14, 18 and 19, 26, 27 only.
E. V. R. III., H. VII. and VIII. ¹	1597.	Jane Yetsewirt ..	?	?	B.M.: K.: L.I.	T. P.: C. R.: Y. F. S.	
do.	{ T. p. 1620. ² 2 T. p. 1619.	Co. of Stationers ..	?	?	H.: K.: L.I.	T. P.: Y. P. S.	
do.	1679 12.	Various printers ..	?	?	In general use ..	Large folio: T. P.: C. R.: Y. P. S.	
"Elenchus" to do. by Fleewood.	{ T. p. 1579. Colo. 1576, Sept. 10.	Richard Tottell ..	?	?	B.M.: K.	24mo: T. P.	Dedication to Thomas Brumley.
do.	1597.	Jane Yetsewirt ..	?	?	B.M.: K.	24mo: T. P.	do.
Ashe's Epici- kcia, or Ta- ble to the Year Books ⁴	1609.	{ Societe of Sta- tioners.	?	?	?	24mo: T. P.	do.

¹ This "Part," as made up in the 1597, 1619, and 1679 editions, includes 1 Edw. V.; 1 and 2 Rich. III.; 1 to 16, and 20, 21 Hen. VII.; and 12, 13, 14, 18, 19, 26, 27 Henry VIII. 2 Notes to Brooke's Abridgment, etc. One general title-page, and another title-page to Hen. VII. One register to 1 Edw. V. and 1, 2 Rich. III.; another to 1-16 Hen. VII.; another to 23, 24 Hen. VII.; and still another to the Years of Hen. VIII.

³ Notes to Brooke, etc.; and "notes in the other margin" to other reports and books of the law.

⁴ With cases of Judge Wm. Dailison and Sergeant Wm. Bendloes to an Appendix.

GENERAL NOTE.—The following Years, not before published, have been recently printed from original manuscripts, under the auspices of the Master of the Rolls, in the series entitled "Chronicles and Memorials of Great Britain and Ireland during the Middle Ages." They are in octavo form, with the original Law-French text and an English translation on opposite pages. Edw. I., Years 20-21; 21-22; 30-31; 32-33. Edw. III., Years 11-12; 12-13; 13-14; 14; 14-15; 15; and 16, Parts I. and II.

TABLE B.
Years of Edward IV. as found in Bound Volumes of Nine Different Sets.

1	N. n.: n. d....	Tottel, 1565.....	Tottel, 1556, No. 1....	Tottel, 1565.....	Tottel, 1556, No. 3	Tottel, 1572.....	Tottel, 1582.....	Tottel, 1582.
2	do.	Tottel, 1566.....	Tottel, 1558.....	do.	Tottel, 1572.....	Tottel, 1572.....	Tottel, 1582.	Tottel, 1582.
3	Pyson, n. d.	do.	Tottel, 1558.....	Tottel, 1566.....	Tottel, 1556, No. 2	Tottel, 1556, No. 2.	Tottel, 1582.	Tottel, 1582.
4	do.	Tottel, 1558.....	Tottel, 1558.....	Tottel, 1556.....	Tottel, 1556, No. 2	Tottel, 1556, No. 2.	do.	do.
5	N. n.: n. d....	Tottel, 1557.....	Tottel, 1557.....	Tottel, 1557.....	Tottel, 1557, No. 2	Tottel, 1572.....	Tottel, 1582.	Tottel, 1582.
6	do.	Tottel, 1557.....	Tottel, 1557.....	Tottel, 1557.....	Tottel, 1557, No. 2	Tottel, 1572.....	Tottel, 1582.	Tottel, 1582.
7	Pyson, n. d.	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556, No. 3	Tottel, 1556, No. 3.	Tottel, 1582.	Tottel, 1582.
8	N. n.: n. d....	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556, No. 3	Tottel, 1556, No. 3.	Tottel, 1582.	Tottel, 1582.
9	Redman, n. d.	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556, No. 2	Tottel, 1572.....	Tottel, 1582.	Tottel, 1582.
10	N. n.: n. d....	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556, No. 2	Tottel, 1572.....	Tottel, 1582.	Tottel, 1582.
11	Redman, n. d.	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556, No. 2	Tottel, 1572.....	Tottel, 1582.	Tottel, 1582.
12	do.	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556, No. 2	Tottel, 1572.....	Tottel, 1582.	Tottel, 1582.
13	Pyson, n. d.	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556, No. 2	Tottel, 1572.....	Tottel, 1582.	Tottel, 1582.
14	do.	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556, No. 2	Tottel, 1572.....	Tottel, 1582.	Tottel, 1582.
15	do.	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556, No. 2	Tottel, 1572.....	Tottel, 1582.	Tottel, 1582.
16	Redman, n. d.	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556, No. 2	Tottel, 1572.....	Tottel, 1582.	Tottel, 1582.
17	do.	Tottel, 1557.....	Tottel, 1557.....	Tottel, 1557.....	Tottel, 1557, No. 2	Tottel, 1572.....	Tottel, 1582.	Tottel, 1582.
18	Pyson, n. d.	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556, No. 2	Tottel, 1572.....	Tottel, 1582.	Tottel, 1582.
19	do.	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556, No. 2	Tottel, 1572.....	Tottel, 1582.	Tottel, 1582.
20	Redman, n. d.	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556, No. 2	Tottel, 1572.....	Tottel, 1582.	Tottel, 1582.
21	do.	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556, No. 2	Tottel, 1572.....	Tottel, 1582.	Tottel, 1582.
22	Pyson, n. d.	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556.....	Tottel, 1556, No. 2	Tottel, 1572.....	Tottel, 1582.	Tottel, 1582.

¹ With this volume was also bound up here Powell's "Long Report" (Long Quinto) of Year 5.

PAYMENT OF BILL OF EXCHANGE OR CHECK BY THE DRAWEE AFTER THE DRAWER'S DEATH.

THE death of the drawer of a bill of exchange or check does not prevent the payment thereof by the drawee after that event from being a good payment as against the personal representative of the drawer, whether at the time of the payment the drawee had notice of the death or not.

The weight of authority supports this view.

In *Billings v. Devaux*¹ it was held that the payee of a bill of exchange could recover from the drawee who accepted after the drawer's death. Tindall, C. J., said:—

"I am not aware of any principle of law by which, upon the death of the drawer of the bill, the rights and liabilities of the parties thereto were at all varied."

In *Cutts v. Perkins*² it was held that the consignee of a ship's cargo, who, after the death of the master, accepted and paid a bill of exchange drawn by the master for the freight, was not liable to the administrator of the master in an action for the freight, although when he accepted he knew of the death and the master was insolvent at the time of his death.

In *Lewis v. International Bank*³ the administrator of the drawer of a check, who had committed suicide, brought an action against the drawee for the drawer's deposit, and the payee of the check was made to interplead, and it was held that the payee was entitled to the amount of the check paid into court by the drawee.

"The death of the drawer of a check before its presentation does not operate as a revocation of the check."⁴

"It should seem that where a bill has been drawn in payment of a debt from the drawer to the payee, the drawee may legally accept the bill after notice of the death of the drawer, such death not revoking the order given in favor of a *bona fide* creditor."⁵

¹ 3 Man. & Gr. 565.

² 12 Mass. 206.

³ 13 Mo. App. 202.

⁴ Am. & Eng. Enc. of Law, 1st ed. vol. 5, p. 137.

⁵ Chitty on Bills, *282. See, also, id. *287; Daniel on Negotiable Instruments, §§ 491, 498 a, 1618 b; article by Daniel in Bankers' Magazine of N. Y., Feb'y, 1879, p. 619; 1 Parsons on Notes and Bills, 287 (2d ed.); Story on Bills of Exchange, § 250; Thomson on Bills of Exchange, 216 (see id. 244); 1 Edwards on Bills, § 568 (3d. ed.).

Contra. "There is no express adjudication on this point, but the text-writers, with

This must be so because of the nature of the bill or check, the death, and the relation of the parties.

The drawee is indebted to the drawer, and by the bill or check the drawer orders him to pay the whole or a specified part of that indebtedness to the payee named in the instrument. Such order is made and completed by the delivery of the bill or check to the payee. How, then, can the death of the drawer countermand such order and undo his completed act?

It is true that the drawer may countermand such order by acts showing his intention so to do, made known to the drawee before payment by him, as in the common instance of the drawer of a check stopping its payment by notice to the drawee.¹

But in order to effect this result, it is necessary that the drawer should take some action showing such intention. Death is not action by the person dying, for in dying one is merely passive and not active. And this is true even in the case of suicide, for although the act of the suicide causes his death, his death is due to the force of the laws of nature to which he must submit; and although he puts those laws in operation, he is, in the end, passive only.²

Such intention cannot be inferred in any case from the death itself.

The order to the drawee not being countermanded by the drawer's death itself, notice of that event to the drawee cannot countermand the order. Notice of an ineffective event cannot make it effective.

perhaps one or two exceptions, state that the death of the drawer countermands or revokes the authority of the drawee to pay the check unless it has been certified." Am. & Eng. Enc. of Law, 2d ed. vol. 5, p. 1079. "In regard to checks on bankers, it is considered that the death of the drawer is a countermand of the authority of the banker to pay." V. C. Sandford in *Smith's Ex'r v. Wyckoff*, 3 Sandf. 77. See, also, *Byles on Bills*, *20, *23, *178; 2 *Parsons on Notes*, 82; *Morse on Banks and Banking* (2d ed.), 278; *id.* (3d ed.) § 400; *Burke v. Risley*, 27 La. An. 465, *semble*; *Commercial Precedents* 1892 (selected from *Journal of Commerce*, N. Y.), p. 101, No. 35; 2 *Edwards on Bills*, § 739 (3d ed.).

In *Drum v. Benton*, 13 App. Cas., D. C., 245, 261, Alvey, C. J., said *obiter*: "It has been held in several cases, and laid down as a settled principle by text-writers of authority, that the death of a drawer of a check operates as a revocation of the authority of the bank or banker upon which it is drawn to pay it, though it is clear that if the check be presented and paid before notice of the death the payment is good. . . . The first branch of this general proposition may admit of some doubt upon the more recent authorities."

¹ *Chitty on Bills*, *429; *Freund v. Importers & Traders Nat. Bank*, 3 Hun, 689.

² *Lewis v. International Bank*, 13 Mo. App. 202, is a case of suicide of the drawer of a check.

Much confusion of thought is shown by the attempt of judges and writers of text-books to apply the well-settled rule that the death of a principal revokes the authority of his agent, and the exception thereto that the authority is not revoked by the principal's death if coupled with an interest, to the case of the payment of a bill or check by the drawee after the death of the drawer.

It is obvious that the law of agency is in no way applicable to such a case, as neither the drawee nor the payee is the agent of the drawer. The drawee in paying and the payee in receiving act each for himself and not as the representative of the drawer. The drawee is simply discharging the whole or a part of his indebtedness to the drawer, and the payee is merely receiving the whole or a part of the drawer's indebtedness to him. One man can pay another's debt (with his consent) without being his agent.

It has been often said that the death of the drawer revokes the *authority* of the drawee to pay the bill or check. This of course would be the effect of the death if the check was merely such an authority, but such an authority is not a bill or check.¹

An instrument, in order to be a bill or check, must contain an *order* by the drawer to the drawee to pay to the payee, and such order is a very different thing from an authority to the drawee to pay and to the payee to receive. An authority given by one person to another enables the latter to act for the former, and makes the acts done pursuant to such authority the acts of the person who gave the authority. It is absolutely essential, therefore, for the exercise of such authority that the person who gave the authority should be alive at the time of its exercise, for if he is then dead, the acts of the other cannot be his acts, for a dead man cannot act.

This is not the place to attempt to point out the reasons for the exception to the rule above mentioned, but the guess may be expressed that in the cases where it has been held that an authority was not revoked by the death of the person who gave it, because coupled with an interest, its exercise affected some property, an interest in which had been conferred on the person to whom the authority was given and its exercise enforced or disposed of such interest. If so the party exercising the authority was really acting for himself, and the exception is no exception.²

An authority may be likened to an electric current, passing from one point to another, which requires for its use at the latter point the existence of the source and the continuance of the flow of

¹ 2 Ames's Cases on Bills and Notes, 826; 1 id. 5.

² Hunt v. Rousmanier, 8 Wheat. 174.

power therefrom, and which ceases with the termination of its source.¹

Now an order is merely a direction by one person to another to do a specified thing. Once given it is a completed thing, and requires no further support. If the thing to be done is from its nature the act of the person giving the order, the order is really nothing but an authority, but if the act directed to be done is the act of the person to whom the order is given, it is not an authority, nor is any authority to be implied from it, nor is any authority necessary for the execution of the order. The order simply attaches certain consequences to the doing of the act directed to be done, as in the case of the payment of a bill or check by the drawee, the order makes the payment to the payee a payment of the whole or a part of the indebtedness of the drawee to the drawer.

It is because the drawer ordered the payment that he is estopped from saying that it was improperly made, not because it was made by his agent and consequently his own act.

It necessarily follows that the person to whom the order is given in such a case can do the act directed to be done by him, it being his own act, notwithstanding the death of the person giving the order prior to its execution. So although the death of the drawer would revoke any authority conferred by the bill or check on the drawee or payee, it does not countermand the order to the drawee to pay to the payee.

It is to be regretted that the reasons found in the books for this position are open to criticism. These reasons are :—

(1) That the bill or check is an assignment, *pro tanto*, of the drawer's funds in the hands of the drawee.²

(2) That the authority of the drawee to pay or of the payee to receive the amount of the check is coupled with an interest and therefore not revoked by the drawer's death and notice of it.³

That a bill or check is not an assignment of any funds in the hands of the drawee or of any claim against the drawee has been so often shown to be in accordance with principle, and is so strongly supported by the weight of authority, argument or citation of authority in support of that position is not called for here.

¹ See *Slosson, arguendo*, in *Wallis v. Pres., etc. Manhattan Co.*, 2 Hall, 495 (N. Y.).

² *Lewis v. International Bank*, 13 Mo. App. 202; *Cutts v. Perkins*, 12 Mass. 206; *Chitty on Bills*, *282, *287, note; *Byles on Bills*, *20; *Thomson on Bills of Exchange*, 244.

³ *Lewis v. International Bank*, 13 Mo. App. 202; *Daniel on Negotiable Instruments*, § 1618 b; article by Daniel in *Bankers' Magazine of N. Y.*, Feb'y, 1879, p. 619; *Cutts v. Perkins*, 12 Mass. 206.

It must, however, be admitted that the law is settled to the contrary in some jurisdictions. Of course in those jurisdictions the death of the drawer does not affect the right of the drawee to pay to the payee or of the payee to receive such payment, for the death of the assignor of a chose in action does not cancel the assignment or operate as a re-assignment thereof to the personal representative of the deceased assignor.

There are also some decisions in jurisdictions in which a bill or check is not considered an assignment, holding that the instrument before the court was in effect an assignment, because, although somewhat similar in form to a bill or check, it was made payable out of a specified fund. Of course the death of the drawer of such an instrument would not affect it.¹ The bill, check, or instrument being held an assignment by the drawer, the drawee is not only justified in paying the payee after the drawer's death, but may be sued by the payee if he refuses to make such payment.

In respect to the second reason above mentioned, in addition to what has already been said, to the effect that the law of agency has no application to the rights of the parties to a bill or check, it is necessary to say only that if the drawee has an authority to pay the bill or check, or the payee has an authority to receive payment, such authority is not coupled with an interest. No interest in any property of any kind is given to either drawee or payee. How can it be to the interest of the drawee to pay out money? He gains nothing by the payment to the payee. He is merely paying the whole or part of what he owes the drawer. He could just as well pay to the drawer himself as to the payee. Nor has the payee any interest in the exercise of the supposed authority. He receives nothing that he would not have been entitled to if the bill or check had never been drawn. It gives him no right or claim against the drawee; it gives him no additional security, and he gains nothing by taking it.

The reasons given in the books for the opposite view are even more unsatisfactory. They are:—

(1) That the authority of the drawee to pay is revoked by the death of the drawer.²

(2) That on the drawer's death, his funds in the hands of the drawee pass to his personal representative and are no longer payable on his order.³

¹ *Cullis v. Perkins*, 12 Mass. 206, is such a case.

² See note 5, *supra*, p. 588.

³ *Morse on Banks and Banking*, 2d ed. 278; id. 3d ed. § 400.

As to the first of these reasons it has been pointed out above that a bill or check is more than an authority to the drawee to pay, and that the order it contains survives the drawer's death.

The second reason is insufficient, because the personal representative of the drawer is in law the same person as the drawer, his order survives his death, and is in law the order of his personal representative. If it was not in law his order he could not countermand it, as no one can countermand an order not his own, but of course the personal representative of the deceased drawer can stop payment of the bill or check by notice to the drawee not to pay it.

In England the law on this question has been changed as to checks by the Bills of Exchange Act, 1882, 45 & 46 Vic. chap. 61, § 75, which is as follows :—

"The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by (1) countermand of payment; (2) notice of the customer's death."

In Massachusetts by statute the drawee may pay a demand draft or check notwithstanding the death of the drawer, if it is presented within ten days after its date.¹

There may be legislation affecting this question in other states.

All the authorities agree that payment by the drawee after the drawer's death, but before notice of that event, is a good payment as against the personal representative of the drawer.²

This is so because the order to pay to the payee is not countermanded by the drawer's death. If the bill or check was only an authority to the drawee to pay and to the payee to receive, it would cease at the instant of the death, and the payment thereafter would not be good. An agent's authority ceases on the death of his principal before he has notice of it, and any act done by him as agent after the death is unauthorized and not binding on his principal's personal representative (*Mechem on Agency*, § 245). It is clearly inconsistent to hold that payment before notice of the death is good and payment after such notice bad. Neither can be good if dependent on an authority. Both must be good because the order survives the death.

The payment being made pursuant to the existing order of the

¹ Chap. 210, General Laws of Mass. of 1885.

² *Chitty on Bills*, *429; *Byles on Bills*, *23; *Daniel on Negotiable Instruments*, § 1618 b; 2 *Pars. on Notes and Bills*, 82; *Morse on Banks and Banking*, 2d ed. 278; id. 3d ed. § 400; *Tate v. Hilbert*, 2 Ves. Jr. 111, *semble*; *Brennan v. Merchants'*, etc. Bank, 62 Mich. 343, 346, *semble*; *Drum v. Benton*, 13 App. D. C. 245, 261, *semble*; *Am. & Eng. Enc. of Law*, 2d ed. vol. 5, p. 1079; 2 *Edwards on Bills*, § 739 (3d ed.).

drawer there seems to be no more reason for holding that, if the drawer was insolvent at the time of his death, his personal representative could recover from the payee the amount so paid, on a *quasi* contract, founded on the rule forbidding unjust enrichment of one at the loss of another, leaving the payee to share *pari passu* with the other creditors of the drawer, than in a case where the payment was made before the drawer's death, and surely in that case the payee cannot be made to repay the amount received by him from the drawee.

It must be admitted that it is the almost universal practice of merchants and bankers to refuse to pay a bill or check when they have notice of the drawer's death.

They run little or no risk in so refusing, for the drawee of a bill is under no obligation to pay the same, even though he have funds of the drawer in his hands, and though a bank or banker is liable in damages for refusing to pay a check of a customer, having sufficient funds on deposit for that purpose, the damages would be nominal only where the refusal was after the customer's death. A dead man's credit cannot be injured.

George H. Balkam.

NEW YORK, February, 1901.

EXECUTORY DEVISES IN ILLINOIS.

THE Supreme Court of Illinois disposes of a large number of cases each year. It apparently decides annually somewhere from 500 to 600 cases. Promptness in the decision of cases is a well-recognized and highly appreciated virtue of the court. Its dispatch of business in times past has been the more remarkable, from the fact that until within three years the court was a peripatetic body, holding successive terms at Ottawa, Springfield, and Mount Vernon. There is small reason for wonder, then, that the court should occasionally, in the pressure of work, have fallen into errors and inconsistencies. It is, nevertheless, unfortunate that the law, in important and fundamental branches, should become obscured and confused through errors of the court. It is in the hope of helping to clear up such errors, and to restore order in an important matter where, as it seems to me, confusion now reigns, that I contribute this article.

Upon the important subject of executory testamentary dispositions, the decisions of our Supreme Court appear to me most confused, inconsistent with each other, and contrary to well-established legal principles. The validity of an executory devise in fee limited to take effect upon the happening of a specified event, in defeasance of a prior devise in fee, certainly ought not to be doubtful. Devises of this character are perhaps the most common and well-recognized kind of executory devise. The books fairly swarm with examples of them. Yet in our state the validity of such executory devises is most questionable, as I now propose to show.

In the case of *Wolfer v. Hemmer*,¹ the court declares adherence to the doctrine that an executory devise limited after a prior devise of a fee with full power of alienation is void because inconsistent with the prior estate and absolute power of disposition. Professor Gray's well-known criticism of this doctrine² shows how it originated, through a misconception of an early English case, in the case of *Ide v. Ide*,³ and how this error, thus

¹ 144 Ill. 554.

² Gray's *Restraints on Alienation* (2d ed.), secs. 68-70 and 74, b, c, d, and e.

³ 5 Mass. 500.

originated, was given a wide vogue by Chancellor Kent's promulgation of it in his commentaries and decisions. It would seem that our court was justified by authority in adopting the doctrine, erroneous though it be in its origin and upon principle. Aside from the doctrine just referred to, the case seems, by inference at least, to hold that, in the absence of express power of alienation in the prior devisee in fee, the executory devise over would have been valid.

In the case of *Ewing v. Barnes*,¹ the testator had devised land to Edwin Albert Ewing, to have and to hold to him "and to his heirs and assigns forever." By another clause of his will, the testator provided that, "in case of the death of Edwin Albert Ewing without heirs of his body, all the property bequeathed and devised to him in this will" should go to and vest in, "upon his death without issue," A and B. The court held that, the will having devised the premises to Edwin Albert Ewing in fee, the devise over to A and B, "being clearly inconsistent with the devise in fee," could not be sustained. The court refer to the case of *Wolfer v. Hemmer* and quote 4 Kent's Commentaries, p. 270, as follows: "If, therefore, there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A in fee, and if he dies possessed of the property without lawful issue, the remainder over, or remainder over the property which, he, dying without heirs, should leave, or without selling, or devising the same, in all such cases the remainder over is void as a remainder, because of the preceding fee; and it is void by way of executory devise, because the limitation is inconsistent with the absolute estate or power of disposition expressly given or necessarily implied by the will. A valid executory devise cannot subsist under an absolute power of disposition in the first taker."

With all deference, the court quite misses the point of the passage quoted. The important words are: "if there be an absolute power of disposition (alienation) *given by the will to the first taker.*" The whole doctrine rests upon the power of alienation given by the will itself. In the case under discussion, the will gave no power of alienation whatever to Edwin Albert Ewing; consequently, the language above quoted was entirely inapplicable. The will seems clearly to present the familiar case of a prior devise in fee, with a subsequent devise over upon the death of the first taker "without heirs of his body."² If those words referred

¹ 156 Ill. 61.

² By Illinois Statutes, Ill. R. S., ch. 30, sec. 6, estates tail are converted into a life

to a failure of issue at the decease of the first taker, the executory devise over to A and B was indubitably good. If, on the other hand, the words imported a general failure of issue, — that is, a failure at any time at or after the death of the first taker, then the devise over was clearly bad, not because repugnant to the prior gift, but because it was limited to take effect upon an event too remote, and was consequently obnoxious to the rule against perpetuities.¹

The case of *Silva v. Hopkinson*² was a case identical in principle with the preceding case. The testator gave an estate in fee to his two daughters with limitations over in case of their death without issue. The court say: "they (the daughters) take an unconditional fee, and no executory devise can, in such case, exist."

In the subsequent case of *Glover v. Condell*,³ the court appeared to open its eyes to the errors into which it had fallen in *Ewing v. Barnes* and *Silva v. Hopkinson*. The case involved the consideration of a testamentary gift of personal estate limited to take effect, in defeasance of a prior absolute gift to testator's son, in the event of the son's death without living heirs of his body. The case was evidently well argued, and the decision of the court is, in the main, well considered and valuable. Upon the language of the will, the court construes death without heirs of the body to import a definite failure of issue, and hence holds the gift over is not too remote. The court then says, discussing executory devises, "A gift over upon a definite failure of issue does not alter the construction of the preceding limitation, but engrafts upon it an executory devise to operate upon the happening of the event specified. (11 Am. & Eng. Ency. of Law, p. 924.) As applied to land, an executory devise is 'such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law.' (2 Washburn on Real Prop. 5th ed. marg. p. 341.) One species of executory devise, as applied to lands, is 'where a fee simple is devised to one, but is to determine upon some future

estate in the first taker with a fee in remainder in the first person who would inherit at common law *per formam doni*; consequently the gift over could not in any case be construed as a remainder after an estate tail. *Summers v. Smith*, 127 Ill. 645.

¹ The Illinois Supreme Court leans very strongly towards a construction of devises on failure of issues, as referring to a definite failure of issue. *Summers v. Smith*, 127 Ill. 645; *Glover v. Condell*, 163 Ill. 566; *Strain v. Sweeny*, 163 Ill. 603; *Smith v. Kimball*, 153 Ill. 368.

² 158 Ill. 386.

³ 163 Ill. 566.

event, and the estate thereupon to go over to another.' (Id. p. 344.) Or, stated more generally, one species of executory devise relative to real estate is 'where the devisor parts with his whole estate, but, upon some contingency, qualifies the disposition of it, and limits an estate on that contingency.' (4 Kent's Com. marg. p. 268.) Limitations over upon the death of the first taker without issue are construed as executory devises on definite failure of issue after an estate in fee simple. (2 Jarman on Wills — R. & T.'s 5th Am. ed. p. 485.) Thus, a devise to A and his heirs, with a gift to B, in case A dies without issue surviving at the time of his death, gives B an executory devise. (Am. & Eng. Ency. of Law, p. 920, and cases in note 1.)"

The court then points out that substantially the same rules apply to executory bequests of personalty as to executory devises, and finally the court holds the gift over to be valid as an executory bequest. The court takes pains expressly to overrule *Ewing v. Barnes* and *Silva v. Hopkinson*. The court says: "This court has held in a number of cases that although a fee cannot be limited upon a fee by deed, yet it can be so limited by will by way of executory devise (citing *Ackless v. Seekright*, Breese, 76; *Siegwald v. Siegwald*, 37 Ill. 430, and other cases). *The case of Ewing v. Barnes*, 156 Ill. 61, so far as it holds to the contrary, is overruled. The language used in *Silva v. Hopkinson*, 158 Ill. 386, should be construed as applicable only to the facts of that case, and not as contravening the doctrine of *Siegwald v. Siegwald*, *supra*, and the other cases of a like character above referred to." In the case of *Strain v. Sweeny*,¹ the language just quoted is quoted with approval.

It was to be expected the cases of *Glover v. Condell* and *Strain v. Sweeny* had put an end to the heresies of the court in the earlier cases above criticised. But, amazingly enough, we find the court in the recent case of *Lambe v. Drayton*,² returning to its abandoned errors. In that case the testator devised his real estate to his wife, "her heirs and assigns," to have and to hold the said real estate to his said wife during her lifetime. He also gave his wife all his personal estate, and then provided that his executors should divide whatever of the real and personal estate was left at the time of the wife's death, equally among his three children or their legal heirs. The court, by a process of reasoning (which seems hardly satisfactory), relying upon the principle which rejects

¹ 163 Ill. 603.

² 182 Ill. 110.

the habendum of a deed when inconsistent with the premises, and upon our statute providing that grants or devises of real estate without words of inheritance shall be deemed to pass a fee simple if a less estate be not limited by express words or "by construction or operation of law," arrives at the conclusion that the original devise to the wife is in fee simple. The court then considers⁹ the devise to the children. The court says: "It is clear that, inasmuch as the widow took a fee simple estate by the first clause, the estate over sought to be given to the children by the third clause was void as being inconsistent with the gift in the first clause. The devise of an estate in fee carries with it the power of alienation; and 'when the first devisee has the absolute right to dispose of the property in his own unlimited discretion, and not a mere power of appointment among certain specified persons or classes, an estate over is void, as being inconsistent with the first gift.' (Wolfer v. Hemmer, *supra*.)"

The court, after quoting the passage from Kent above quoted (page 596, *supra*), proceeds: "So, here, the remainder over to the children, attempted to be given by the third clause of the will, was void, because, by the first clause, the preceding fee had been given to the widow, Mrs. Drayton; and as the fee simple title, which had been given to her, included and involved the absolute power of disposition, the remainder in the third clause was void by way of executory devise. The limitation in the third clause is inconsistent with the power of disposition necessarily implied in the devise granted in the first clause."

It may be urged that the words, "what is left at my (testator's) wife's death," would contain an absolute power of alienation in the first taker, and hence would bring the case within the principle of Wolfer v. Hemmer. Such a contention would seem to be entirely sound on the authority of the cases of Saeger v. Bode,¹ *In re* Estate of Cashman,² and of 4 Kent Comm. p. 270, so often quoted by the court. But the court expressly negatives this view, saying, "it is true that the will of Robert J. Drayton did not expressly confer upon Mrs. Drayton, the first taker, the power of selling or otherwise disposing of the estate as she might see fit." And the court bases its decision upon the theory that "such power (of alienation) was involved in the fee simple title granted to her" (the wife). The court cite Wolfer v. Hemmer, but not Ewing v. Barnes, Silva v. Hopkinson, or Glover v. Condell.

¹ 181 Ill. 514.

² 134 Ill. 88.

I confess I am utterly unable to account for this decision. If the result reached by the court was correct, as seems probable, on the theory that the will gave the wife a fee with power of alienation (implied by the gift over of what was left at her death), certainly nothing can be said in defence of the reasoning of the court. This is all the more extraordinary, since the opinion is by the same learned judge who laid down the law correctly in *Glover v. Condell*. The court's opinion is based upon the theory that the prior devise of a fee necessarily implies full power of alienation, and hence is inconsistent with, and repugnant to, the executory devise over. This view seems plainly indefensible. Professor Gray has shown how conditional limitations of all sorts were at first held destructible, like contingent remainders, and how the great case of *Pells v. Brown*,¹ decided in 1620, established the principle, never since then questioned, that an executory devise is indestructible by alienation or other act of the first taker.² The court could have learned the law equally well from Kent's Commentaries, Fearn on Remainders, or any of the standard works on real property, or, for that matter, from the American and English Encyclopædia of Law. Thus we find in Kent's Commentaries, vol. 4, p. 270: "Nor can an executory devise or bequest be prevented or destroyed by any alteration whatsoever, in the estate out of which, or subsequently to which, it is limited. The executory interest is wholly exempted from the power of the first devisee or taker." The learned chancellor, a few lines before, in pointing out the differences between executory devises and remainders, had said: "A fee may be limited (by executory devise) after a fee, as in the case of devise of land to B in fee, and if he dies without issue or before the age of twenty-one, then to C in fee." We find in Fearn on Remainders, p. 418, "it is a rule that an executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate out of which or after which it is limited."³ Page 421, "That executory devises or bequests, in chattels, are equally secure as in real estates against the disposition of the first devisees or legatees of the preceding or limited interest therein, appears, in respect to chattels real, by Manning and Lampett's cases above noticed; in both of which it was resolved, that after

¹ Cro. Jac. 590.

² Gray on Perpetuities, secs. 142 *et seq.*, and 159. The law was established the same way as to executory bequests of chattels real as early as 1609 by Manning's case, 8 Co. 94 b.

³ The case Fearn points out in illustration of his statement is *Pells v. Brown*, in which, as Fearn points out, the first limitation was in fee.

the executor had assented to the first devise, it lies not in the power of the first devisee to bar him who has the future devise; for he cannot transfer more to another than he has himself," etc., etc. Washburn, *Real Property* (4th ed. vol. 2, p. 698) reads, quoting Watkins on Conveyancing, "an executory devise cannot be barred or destroyed by any act of the person taking the preceding fee, or conveyance even by feoffment or matter of record." . . . "An executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate (fee) out of which or after which it is limited." In *American and English Encyclopædia of Law*, vol. 20, p. 963 (title Remainders), we find: "But since such interests (executory interests) arise independently of the preceding estate, they cannot be destroyed or prevented from taking effect by any alteration whatever in that estate, and hence the owner of a preceding estate in fee simple can do nothing to bar or affect the subsequent executory interest."¹

The amount of authority of decided cases that might be collected in support of the foregoing principles would be limited only by the patience of the collector. I shall content myself with one case, *Nightingale v. Burrell*.² In that case we find the following language: "The essential difference in the quality of the estate, between a remainder and an executory devise, is, that the former may be barred at the pleasure of the tenant in tail, by a common recovery, or, in our state, by a conveyance by deed; but he who holds by force of an executory devise, has an estate above and beyond the power and control of the first taker, who cannot alienate or change it, or prevent its taking effect, according to the terms of the will, upon the happening of the contingency upon which it is limited."

The doctrine of *Ewing v. Barnes* and *Lambe v. Drayton* simply abolishes the most common and characteristic kind of executory devise, an executory devise limited to take effect in defeasance of a prior devise in fee, — a kind of devise universally recognized as perfectly valid, and so recognized even by Chancellor Kent, who stood sponsor for the American doctrine of the invalidity of executory devises after prior devises in fee with express or implied power of alienation.³

The cases thus far examined develop a confusion in the law which is certainly serious and fundamental. But I have by no means told the whole story. We have seen how, in *Wolfer v.*

¹ See 2 Greenl. *Cruise, Real Prop.* 369; Tiedemann, *Real Property*, sec. 541.

² 15 Pick. 104.

³ 4 Kent, *Comm.* 269; and see 2 Black. *Comm.* 172.

Hemmer,¹ the court announces adherence to the doctrine of the invalidity of an executory devise limited after a prior devise of the fee, with absolute power of alienation. Curiously enough we shall find a line of cases in which the court holds the exact opposite. In *Friedman v. Steiner*,² the testator devised "all the rest and residue" of his estate, real and personal, unto his wife, R, "and unto her heirs and assigns forever." "Provided, however, upon the express condition" . . . in case the said R, "after my decease shall die intestate and without leaving her surviving lawful issue; . . . that then and in such event all the rest and residue of my said estate so bequeathed and devised unto her" shall be converted into money and paid over to certain specified persons. The lower court held that R took a fee simple absolute in certain land which passed under the above provisions of the will, with full right to alienate in fee simple, and that the devise over operated only upon what property might remain undisposed of at her death. Upon appeal counsel for those claiming under the devise over insisted that R took only a life estate with a power of appointment by will. Counsel for R took the position that R had a fee simple absolute, and that the devise over was bad as repugnant to the fee simple given to R. The Supreme Court held that the lower court and both counsel were wrong; that R took a "fee determinable;" that she had power to convey or devise a fee simple absolute, and that the gift over upon her death intestate and without heirs of her body her surviving, was good, but would operate only upon undisposed-of property. The court professes to recognize the principle that "conditions that are repugnant to the estate to which they are annexed are absolutely void;" but holds that the estate granted was not a fee, because inheritance by collateral heirs was excluded (*sic*), and that therefore the gift over was not repugnant to the gift to R. The court does not discuss the nature of the estate given over in case of the death of R intestate and without issue. It refers to it as a "contingent or conditional limitation over." The court rely upon but a single authority, — Kent's Commentaries.

I cannot understand how the court arrived at the conclusion that R was given full power of alienation (except by will). The reasoning of the court on this point seems to proceed upon the fallacy above pointed out, into which the court fell in the case of *Lambe v. Drayton*. But if we assume that the court was correct in holding that R had full and absolute powers of alienation, it is

¹ 144 Ill. 554.

² 107 Ill. 125.

impossible to reconcile the case with *Wolfer v. Hemmer*. Both cases were cases of a prior devise in fee with a devise in fee over to take effect upon the death of the first taker leaving no issue her surviving, and in both cases the first taker was given full and absolute powers of alienation; yet in the one case (*Friedman v. Steiner*) the devise over was held good, while in the other (*Wolfer v. Hemmer*) it was held bad. The court in *Wolfer v. Hemmer* make no mention of *Friedmann v. Steiner*, and it might be supposed that the later case overruled the earlier one, *sub silentio*. But no! in the recent case of *Koeffler v. Koeffler*,¹ we find the case of *Friedman v. Steiner* followed and approved to the fullest extent. The case of *Koeffler v. Koeffler* was a case of a bequest of real and personal property to a son in fee with a bequest over in case the son should die under the age of twenty-five, or over that age, leaving no issue him surviving, *with full and express powers of alienation in the son* on reaching twenty-five. The court, on the authority chiefly of *Friedman v. Steiner*, held that the gift to the son was a "fee determinable," and that the bequest over was perfectly valid, and carried the residue (both real and personal) not disposed of by the son. The case of *Wolfer v. Hemmer* was not mentioned. As the court does not profess to distinguish *Wolfer v. Hemmer* from *Friedman v. Steiner*, it is not easy to guess what distinction, if any, the court had in its mind, or how it would attempt to justify or reconcile these two lines of decisions. In the case of *Friedman v. Steiner*, and other cases following it, the court have a great deal to say about a "fee determinable." Apparently the court are of opinion that while an estate cannot be limited after a fee simple with powers of alienation by way of executory devise, this may be done where the prior estate is not a fee, but a fee *determinable*. Our court has held that a remainder in fee after a life estate, with full power of alienation, is good,² and the court in *Friedman v. Steiner* apparently thought the doctrine of repugnancy would apply only where the prior fee was a full fee simple. But the slightest examination shows the utter futility of the attempted distinction. The notion of a fee determinable is derived by the court straight from Kent's Commentaries. Kent³ mentions two kinds of determinable fees. The first kind is where the happening of the contingency merely cuts short the fee simple estate, as "a limitation to a man and his

¹ 185 Ill. 261.

² *Hamlin v. United States Express Co.* 107 Ill. 443.

³ 4 Comm. 9.

heirs so long as A shall have heirs of his body . . . or till the marriage of B, or so long as St. Paul's Church shall stand." The second kind is where the contingency which cuts short the prior fee also gives rise to a new estate. Kent expressly says, "*all fees liable to be defeated by an executory devise are determinable fees.*" It is perfectly evident that the kind of "determinable fee" the court had before it in *Friedman v. Steiner*, *Koeffler v. Koeffler*, and similar cases, was a fee "liable to be defeated by an executory devise." In *Summers v. Smith*,¹ the court expressly held the gift after a "fee determinable" of precisely the same character as that in *Friedman v. Steiner*, to be an executory devise, and sustained it as such. Consequently, by denominating the prior estate a "fee determinable," the court does not advance a step toward a correct decision of the case, which will depend upon the principles governing executory devises.

Friedman v. Steiner professes to proceed upon the authority of certain passages in Kent's Commentaries. But it requires only a casual examination of that famous work to develop the utter inconsistency of the case in question with the principles laid down in the great commentary. The very passage of the commentaries in which Kent states the doctrine of the repugnancy of an executory devise to a prior devise in fee, with full powers of alienation, illustrates that doctrine by the example of a devise of the identical kind found in *Friedmann v. Steiner*. He says in the passage heretofore quoted, "If, therefore, there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A in fee, and if *he dies possessed of the property without lawful issue*, the remainder over, . . . the remainder over is void" by way of executory devise, "because inconsistent with the absolute estate or power of disposition expressly given, or necessarily implied by the will," etc., etc.²

The law in Illinois can be summed up as follows: A devise to A and his heirs; but if A shall die leaving no issue him surviving then to B and his heirs. (a) The devise over to B is void as "clearly inconsistent" with the prior devise to A.³ (b) The devise over is good as an executory devise.⁴

¹ 127 Ill. 645.

² 4 Kent, Comm. 270.

³ *Ewing v. Barnes*, 156 Ill. 61; *Silva v. Hopkinson*, 158 Ill. 386. And see *Lambe v. Drayton*, 182 Ill. 110.

⁴ *Ackless v. Seekright*, Breese, 76; *Wolfer v. Hemmer*, 144 Ill. 554; *Glover v. Condell*, 163 Ill. 566; *Strain v. Sweeny*, 163 Ill. 603.

A devise to A and his heirs, with full power to alienate in fee simple absolute, and, in case A shall die leaving no issue him surviving, the undisposed of portion to B and his heirs. (a) The devise over is bad as repugnant to the prior devise.¹ (b) The prior devise to A is a "fee determinable," and the gift over to B is perfectly good, and carries the undisposed of residue.²

Louis M. Greeley.

CHICAGO, September 24, 1900.

¹ *Wolfer v. Hemmer*, 144 Ill. 554; *Burton v. Gagnon*, 180 Ill. 345.

² *Friedman v. Steiner*, 107 Ill. 125; *Summers v. Smith*, 127 Ill. 645; *Koeffler v. Koeffler*, 185 Ill. 261.

Note the very close parallelism between the facts in *Friedman v. Steiner*, 107 Ill. 125, and *Burton v. Gagnon*, 180 Ill. 345, which were decided opposite ways.

Mr. Lessing Rosenthal, of the Chicago bar, has preceded me in criticism of many of the Illinois cases criticised in this article. 28 Chicago Legal News, p. 257.

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RETROACTIVE LAWS AND THE FIFTH AMENDMENT. — Retroactive laws are not necessarily unconstitutional, since the constitutional prohibition against *ex post facto* laws is confined to criminal cases. *Calder v. Bull*, 3 Dall. 386. A retroactive law may be attacked as impairing the obligation of contracts. But as this clause of the constitution applies only to state legislation, *Mitchell v. Clark*, 110 U. S. 633, 643, Congress may pass a retroactive law as to civil cases, provided that the prohibition of the Fifth Amendment, that no person shall "be deprived of life, liberty, or property without due process of law," is not infringed. A recent case presents a very close question as to how far such an act of Congress may go. *Evans-Snider-Buell Co. v. McFadden*, 105 Fed. Rep. 293 (C. C. A., Eighth Cir.). A mortgage on cattle in Indian Territory had been executed by a non-resident, and recorded in the county where the cattle were. Finding the mortgage on record a creditor of the mortgagor attached the cattle, and got judgment against the mortgagor. By the laws of Indian Territory, which Congress had adopted from Arkansas, the mortgage, not being recorded where the mortgagor resided, was of no effect against subsequent incumbrancers even if they had notice. The mortgagee nevertheless intervened, and his claim was still before the courts, when Congress passed a statute validating all such mortgages "heretofore executed." The court held that this statute was constitutional as against this attaching creditor, and decided in favor of the mortgagee, although it was admitted that the mortgagee could not have prevailed under the law of Indian Territory as it previously existed.

This decision might be placed either on the ground that the attaching creditor who had judgment was not deprived of any property, or on the ground that there was "due process of law." As to the first ground, it has been held that an attaching creditor before judgment has property

rights in the articles attached. *Hannahs v. Felt*, 15 Iowa, 141. There is authority, however, *contra*. *Freiberg v. Singer*, 90 Wis. 608. But after an attaching creditor has got judgment he has virtually a mortgage given him by law; and it would appear, therefore, that he then has a legal property right in the attached goods. This seems to be presupposed in the decision that state exemption laws undertaking to cut off existing attachments after judgment are unconstitutional as impairing the obligation of contracts. *Gunn v. Barry*, 15 Wall. 610. But, although there was, therefore, a deprivation of property in a strict sense of the term, the principal case may well be supported on the second ground. "Due process of law" is an historic phrase equivalent to "the law of the land," and prevents only an arbitrary exercise of legislative power. *Bank of Columbia v. Okely*, 4 Wheat. 235, 244. See Cooley, Const. Lim. 6th ed. 431. Much may be done by a legislature to cure defects of form in past transactions in order to bring about equitable results. *Campbell v. Holt*, 115 U. S. 620; *Mechanics, etc. Savings Bank v. Allen*, 28 Conn. 97. Although the attaching creditor has a legal property right, yet it is difficult to say that it is arbitrary to prevent him from enforcing it against a mortgage of which he had notice. The argument of the court, "that there is no such thing as a vested right to do wrong," seems to amount to very much the same thing. *Foster v. Essex Bank*, 16 Mass. 245, 273. It may well be doubted whether this act of Congress would not be unconstitutional, as against an attaching creditor without notice of the mortgage. *Williamson v. N. J., etc. R. Co.*, 29 N. J. Eq. 311, 333 (*semble*). But since in the principal case there was such notice, the effect of the act here would seem not to have been arbitrary, and therefore not within the prohibition of the Fifth Amendment.

It should not be overlooked, however, that in order to reach a contrary result, it must also be maintained that Congress is constitutionally bound by the amendments in governing the territories. Nevertheless, since the case may be supported on other grounds, the court's failure to discuss the point seems appropriate, in view of the fact that at the time of the decision light on that question was soon to be expected from the Supreme Court of the United States.

EXTRADITION IN THE ABSENCE OF TREATIES.—Before extradition treaties were as common as at present, the question was important whether the President had power to extradite a criminal to a country with which there was no treaty. There has been but one case where the President exercised the power, and the action was so hastily completed that its legality was not brought before the courts. *Arguelle's Case*, Dana's Wheaton, § 115, note 73. To support the power of the President so to act, it seems necessary to adopt the view that since the United States is a sovereign nation, all powers usually belonging to sovereigns adhere to the federal government, unless by the constitution reserved to the states or to the people. This principle, however, is at least open to the objection that the federal government is not the sovereign of the United States, and that the delegation of a particular power or function to any department of the government is not lightly presumed. For "the government of the United States can claim no powers which are not granted to it by the constitution; and the powers actually granted must be such as are expressly given or given by necessary implication." Marshall, C. J., in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326.

Moreover, the rule that the President has no power, as well as no duty, to surrender a fugitive in the absence of a treaty of extradition, has been generally accepted. *Ex parte M'Cabe*, 46 Fed. Rep. 363; Spear, Extradition, 13; Wharton, International Law Digest, § 268; *Washburn's Case*, 4 Johns. Ch. Rep. 106 (*semble, contra*).

The question whether Congress has this power has never been considered to any extent, since, until recently, Congress has not attempted to regulate or provide for extradition except to countries having extradition treaties with the United States. As extradition is essentially an executive function, the power of extraditing in the absence of treaties, if existing, would most naturally seem to appertain to the executive, and the only way in which to support the right of Congress so to provide for extradition appears to be the broad ground that Congress has power to pass any law not prohibited by the constitution. It may be that it is desirable to adopt a principle that will sustain the power in question either in the President or in Congress; but any principle that will reach this result is hardly consistent with the former rule of constitutional construction that the federal government is one of delegated powers only.

If Congress has this power, the Supreme Court has recently missed an opportunity of recognizing its existence. *Neeley v. Henkel*, 21 Sup. Ct. Rep. 302. The court affirmed the judgment of the lower court in denying the application for a writ of *habeas corpus* made by Neeley, who was detained pending extradition to Cuba under the provisions of the act of June 6, 1900, providing for the extradition of criminals in certain cases "to foreign countries or territories . . . occupied by or under the control of the United States." 31 Stat. 657, ch. 793. The constitutionality of this act was upheld upon the ground that it was a proper means of carrying out the duty assumed by the United States in the treaty of Paris, to "discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property." 30 Stat. 1755. The case is probably correctly decided, upon the grounds intimated by the court. But the question of the power of Congress to pass such a statute in the absence of a treaty obligation is expressly left undecided; the determination of that question must await an attempt to extradite to a country occupied by the United States during a future war, or, since the obligation of the treaty does not extend to Porto Rico or the Philippines, an attempt to extradite to those islands, should they be considered a "foreign country or territory" within the meaning of the act.

RECOGNITION OF TRUSTEES AT LAW. — A trustee in his representative capacity, as distinguished from his personal capacity, unlike an executor, has never been recognized as a separate person by the common law. Yet the possibility of such a recognition arising was suggested by a recent case. *Parmenter v. Barstow*, 47 Atl. Rep. 365 (R. I.). The plaintiff brought action against the defendant "as trustee," alleging that, owing to the negligence of a stone-cutter employed on the trust property, her eye had been put out by a piece of flying stone. The court held that, if the defendant was liable, it was in his personal, not in his representative capacity, and on this ground sustained a demurrer. Although no situation is mentioned in which judgment ought properly to be given out of the trust estate against the trustee as such, to be levied on the trust estate,

yet the decision clearly recognizes the possibility of such a judgment, if a proper case should come before the court, as otherwise the addition of the word trustee to the defendant's name, would be mere surplusage, and no ground for demurrer. The case follows a New York decision. *Keating v. Stevenson*, 24 N. Y. App. Div. 604. But other American decisions are *contra*. *Odd Fellows Hall Asso. v. McAllister*, 153 Mass. 292; *Blackstone Nat. Bank v. Lane*, 13 Atl. Rep. 683 (Me.); *Sass v. Hirschfield*, 56 S. W. Rep. 941 (Tex. Civ. App.).

It may be argued that the error in the principal case is merely an unimportant one of pleading. But at the present day certain causes tend strongly to make the courts recognize trustees in their representative capacity, so that any error is dangerous which suggests the propriety of such recognition. In the first place the courts enter judgment against receivers as such. The true ground for this is that receivers are mere officers of the court of equity. The court has title to the property, and without its consent no suit can be brought against them. Thus they differ fundamentally from trustees who, having title, come under any liability resulting from its possession. Yet receivers have been called quasi-trustees, and their liability placed by some courts on the same footing as that of ordinary trustees. *Camp v. Barney*, 4 Hun, 373. As a result, it has been sometimes felt that if judgment may be entered against a receiver as such, it ought to be entered against a trustee in a similar manner. In the second place, there are two instances in which creditors of trustees may reach the trust estate directly. Creditors of an insolvent trustee, who has a right to pay his indebtedness out of the trust property, may now, in many instances, reach such property itself in equity. 14 HARVARD LAW REVIEW, 67. Likewise it has become common for a trustee to enter into obligations expressly stipulating that he shall not be personally liable, and that creditors must look solely to the trust estate. In such cases an equitable lien on the estate has been sometimes allowed under proper circumstances. *Noyes v. Blakeman*, 6 N. Y. 567. These decisions, since they permit the creditor to look to the trust property rather than to the trustee for his security, are likely to strengthen the notion that the latter may have a position before the law in his representative capacity.

As the law of trustees has grown up solely under equity jurisdiction, the consequences of recognizing trustees at law would, if logically carried out, be far reaching. It would result, of course, that whenever the trustee was liable as such, he could not be personally liable, as necessarily but a single liability would be incurred either in the one capacity or the other. The greatest care in examining trust property would, therefore, have to be exercised by those dealing with trustees. It would likewise result that a trustee could not pass a good title to a *bona fide* purchaser for value, for, if he held title only in his representative capacity, he could not pass it in his personal capacity. Such fundamental changes as these, if ever thought advisable, ought only to be the results of legislation, and clearly could not have been contemplated by the court in the principal case.

VACATING SENTENCE IMPOSED UNDER PLEA OF GUILTY. — A rather unusual situation was presented in a recent case in Illinois. *People v. Arkins* (Criminal Ct., Cook Co.), 33 Chicago Legal News, 192. The defendant, on being arraigned under an indictment charging him with having

received stolen goods knowing them to be stolen, pleaded guilty, and was sentenced to the penitentiary. Subsequently he moved the court to vacate the sentence, and to grant him leave to withdraw his plea of guilty and to enter a plea of not guilty. It was proved that he had always protested his innocence, and had entered the plea of guilty only on the assurance of the prosecuting witness that the judge would at once discharge him. The court said that the plea of guilty was to be treated as a confession, and that being induced by hope of favor it would be set aside.

In so far as the opinion is based on the ground that a plea of guilty is to be governed by the rules applicable to confessions of guilt, the court seems to have confused matters of evidence with matters of pleading. It is true that a plea of guilty does presumably involve an acknowledgment of guilt, but it is in its nature so different from an ordinary confession that the two cannot be treated on the same basis. A confession is an admission of guilt which is to be used with probative force in determining the issue raised by the plea of not guilty. It is an item of evidence which may be overwhelmed by contrary evidence. But a plea of guilty is final; it does away with a trial, and is practically the same as a default in civil proceedings. It is evident that the question of allowing a withdrawal of the plea of guilty cannot with any fairness to the accused be settled within the technical rules concerning the introduction of confessions in evidence. This was partially recognized in the opinion in the principal case, where the promise of favor was made by the prosecuting witness, and not by any officer in authority, so that a confession under the circumstances would have been admissible.

The result reached in the case, however, is clearly correct, but the decision should have been rested on broader principles of criminal procedure. A plea of guilty, doing away with all need of proof of the crime, should be received with great caution, and only when the court is satisfied that the accused understands the situation and is acting voluntarily. *Com. v. Battis*, 1 Mass. 95. When it has once been entered, it lies entirely within the discretion of the court to grant permission to withdraw it. If the motion is made before judgment is pronounced, and is based on reasonable grounds, there is little difficulty in securing leave to change the plea. And although it has been thought that after judgment the plea must stand, *Reg. v. Sell*, 9 Car. & P. 346, this is opposed to the more general practice in cases where the sentence appears unjust to the accused. Thus, where the defendant, a foreigner, pleaded guilty without understanding the nature of the proceedings, the sentence was vacated, and "not guilty" entered. *Gardner v. People*, 106 Ill. 76. The same course was adopted where guilty was pleaded to save the prisoner from the fury of a mob, *Sanders v. State*, 85 Ind. 318, and where the defendant was induced to plead guilty by the promise of a lesser punishment than that which was later imposed. *State v. Stephens*, 71 Mo. 535. Even when the accused had actually spent seven years in prison under such a sentence, he was allowed a new trial. *State v. Calhoun*, 50 Kan. 523. On the other hand, when the plea was freely and understandingly entered, the court will not generally set aside a sentence. *People v. Lennox*, 67 Cal. 113. And since the question of permitting a withdrawal of the plea is addressed entirely to the discretion of the trial court, refusal to grant the request is not a ground for reversal by an appellate court, *Conover v. State*, 86 Ind. 99, unless there has been a clear "abuse of discretion." *Myers v. State*, 115 Ind. 554. In some states, however, the

defendant has, by statute, a right to withdraw the plea in all cases. *People v. Richmond*, 57 Mich. 399. Apart from such enactments, the question should be treated in a broad manner, unhampered by technical rules. On the one hand, the court must see that substantial justice is done to the defendant; on the other, it cannot allow a precedent by which an accused, fully understanding his situation, can plead guilty in the hope of judicial clemency, and then claim the right to withdraw his plea if the sentence is severe.

BILLS OF PEACE TO ENJOIN TORT ACTIONS. — The old conception of a bill of peace brought by several plaintiffs or against several defendants, requiring community of interest in the subject-matter among the persons joined, was long ago outgrown. *Mayor of York v. Pilkington*, 2 Atk. 302. Whether in the cases departing from the early rule the bill is properly called a bill of peace or a bill in the nature of a bill of peace, there is an overwhelming number of decisions in which the only community of interest was in the questions of law and fact involved and the relief sought. Pomeroy, Eq. Jur. 2d ed. §§ 261, note, 269. One court, however, has vigorously maintained that all these cases disclosed some recognized ground of equity jurisdiction other than the prevention of multiplicity of action, which is the basis of a bill of peace. *Tribette v. Illinois, etc. R. R. Co.*, 70 Miss. 882. A Tennessee case recently decided is in line with this opinion. Several actions for nuisance had been begun against a mining company which brought a bill to enjoin them on the ground that certain facts alleged constituted a common legal defence against all. The lower court dismissed the bill except as against three defendants who waived objection to the jurisdiction. No appeal was taken on this point, but the upper court indicated its approval of the position taken. *Ducktown Sulphur, etc. Co. v. Barnes*, 60 S. W. Rep. 593. The facts in *Tribette v. R. R. Co.*, *supra*, were similar and the decision the same. It seems hardly possible to sustain the narrow view of bills of peace which these two cases take. The only other case exactly parallel which has been found reaches the opposite result. *Guess v. Stone Mt., etc. Ry. Co.*, 67 Ga. 215. It is difficult to see any ground of equity jurisdiction in *Mayor of York v. Pilkington*, *supra*, except the identity of the question on which the several controversies turned. Other leading English and American cases are rested in the opinions solely on this ground: *Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. App. 8. In the United States there is a class of cases, explainable only by the same principle, and supported by the weight of authority, in which several persons are allowed to bring a bill for an injunction against the collection of an illegal tax. *Carlton v. Newman*, 77 Me. 408. The contrary decisions in the tax cases rest on a ground foreign to this discussion. On principle the prevention of multiplicity of action seems a ground amply sufficient to support the jurisdiction in cases like the principal case, and no satisfactory reason has been found for restricting the scope of a just, convenient, and practical remedy.

The present case directly decides another interesting question. As between the plaintiff and those defendants who waived objection to the jurisdiction, the court decided that the alleged defence to the actions at law was not made out, and sustained a decree awarding to the three defendants damages for the nuisance. To this there are two objections. When the alleged common defence, which is the basis of the

bill, breaks down, the only ground on which the plaintiff is entitled to maintain a suit in equity or secure an injunction has failed, and the preliminary injunction should be dissolved, the bill dismissed, and the actions at law allowed to proceed. *Storrs v. Pensacola, etc. R. R. Co.*, 29 Fla. 617, 634. Otherwise a defendant in numerous actions arising out of the same facts could always transfer the trial of the cases to a court of equity by making the allegations of his bill sufficiently strong. If it be said that this is an objection which only the defendants may make, and which they may waive, we are met by the established rule, subject to a few well defined exceptions not here in point, that affirmative relief can be given to a defendant in equity only on a cross-bill. *Adams v. Beideman*, 33 N. J. Eq. 77. And though statutes in Tennessee and other states allow the answer to serve as a cross-bill, they do not alter the further rule that affirmative relief prayed in a cross-bill must be equitable relief. *Lautz v. Gordon*, 28 Fed. Rep. 264. The relief given in the principal case was purely legal, and should not have been granted.

JURISDICTION IN HABEAS CORPUS PROCEEDINGS. — In a recent New York case a question arose as to the power of the court to issue a writ of *habeas corpus*, where the prisoner had been removed beyond its jurisdiction. Strangely enough, with the single exception of an elaborate discussion by an equally divided court, in a Michigan case, the point has received but slight consideration. *In re Jackson*, 15 Mich. 417. There is, however, some American authority each way upon the subject. *In re Larson*, 31 Hun, 539; *Rivers v. Mitchell*, 57 Iowa, 193. In the principal case, the defendant, a New York charitable institution, had been intrusted with a child and had bound it out to service in Illinois. The father sued out a writ of *habeas corpus* in New York to compel the defendant to produce the child. The writ was dismissed on the ground that it did not appear that the defendant had any control over the child. *People v. N. Y. Juvenile Asylum*, 68 N. Y. Supp. 279. The court unanimously agreed that the fact that the restraint was being exercised in a foreign jurisdiction would not of itself deprive the court of its jurisdiction. The minority went further, and held that, to excuse itself, the defendant must show that it was absolutely impossible for it in any way to obtain the child. This view is substantially the one adopted in the modern English cases. *Queen v. Barnardo*, 24 Q. B. Div. 283.

An examination of the history and principles of the writ does not confirm the court's position. When first the writ was allowed to a father who had been deprived of his child, its operation was confined within narrow limits. Only when the child was not *sui juris* would the court deliver it over to its father or to any one else. Otherwise, the child was merely released and allowed to go where it pleased; it was even allowed to return to the defendant. *Rex v. Delaval*, 3 Burr. 1436. The writ was regarded as a prerogative writ, issued on behalf of the sovereign, to inquire into the imprisonment of a subject. Its aim was to remedy a public grievance, and only indirectly to benefit the one who obtained the writ. Obviously, then, the question for the court was not whether a father was deprived of his child, but whether a person was subjected to improper restraint within its limits. A subject may have been kidnapped in the state, but the injury to the state ended when its border line was passed.

A writ of *habeas corpus* never could be used to punish a defendant for improperly seizing a citizen or for illegally deporting him from the state. The defendant may remain within its limits, but it is the presence of the wrong, not the wrongdoer, which gives the jurisdiction. *In re Jackson, supra*. This result would not weaken the safeguards of personal liberty. A writ of *habeas corpus* will always issue in the state where the actual restraint is being exercised. If the child is secreted, the common law remedy was by means of a writ *de homine replegiando*, a writ not obsolete in Massachusetts at least. It is true that in some states this writ is abolished, but such a lack of foresight does not justify an improper extension of the writ of *habeas corpus* to serve both purposes. Accordingly, while the result of the principal case is correct, it is to be regretted that the court did not take the opportunity presented firmly to establish the better view which formerly prevailed in New York. *In re Larson, supra*.

SPECIFIC PERFORMANCE OF ALTERNATIVE CONTRACTS. — A late and somewhat curious decision of the Supreme Court of Mississippi grants specific performance of a contract, which the court apparently interprets as a true alternative contract, either to convey a certain lot of land or to pay a definite sum of money. *Phillips v. Cornelius*, 28 So. Rep. 871. It is said that as the defendant in the suit had refused to perform either alternative, the right of election passed to the plaintiff, who could insist on a conveyance of the land. The court invoke the rule that in contracts where a debtor is bound in an alternative obligation to do one of two things, he has the choice of doing one or the other until the time of payment, or until demand, where no time of performance has been agreed on; and upon the failure of the person thus having the option to elect in proper time, the right of election passes to the opposite party. *Corbin v. Fairbanks*, 56 Vt. 538. The citations given in support of this rule lend it a certain plausibility, but are in no way conclusive, and it is impossible on principle to assent to such a proposition. In alternative contracts it is a general rule that the damages in case of a breach are the value of the least beneficial alternative, whereas if the right of election passed to the plaintiff it would follow that he could choose the more valuable. 1 Sedgwick, Damages, § 421. There is but one line of cases that seems inconsistent with this view. In notes where the promisor has the option to pay in money, or in a certain number of specific articles, if he does not exercise that option before the day of payment, it is said that the promisee is entitled to the money. *Roberts v. Beatty*, 21 Am. Dec. 410, note, p. 422. The cases, however, may be explained on the ground that the amount of money mentioned in the note is in the nature of a stipulation for liquidated damages. In *Corbin v. Fairbanks, supra*, the court flatly say that the right of election in an alternative contract passes to the plaintiff on the defendant's default, but it is to be noted that the plaintiff in that case was seeking to recover money, and the court presumably regarded that alternative as a liquidation of the damages. A distinction must be drawn between a contract to convey land, or to pay a certain sum of money as liquidated damages, and a purely alternative contract. A purely alternative contract must not only be alternative in form, but it must appear that the parties intended that the promisor could satisfy his promise equally well by performing either branch. Where such an inten-

tion is apparent there seems no ground for allowing a specific performance of either alternative. Frye, *Specific Performance*, 3d ed. § 153.

In the principal case, however, the contract as set forth in the memorandum might be interpreted as an agreement to convey land, or, in case of failure, to pay a certain sum of money. The question is therefore raised as to whether or not equity will specifically enforce the performance of a contract in which liquidated damages are agreed upon. The fact that the stipulated sum can be recovered at law should not of itself be a bar to proceeding in equity. The promisor does not acquire the right to break his contract on tender of the money, or, in other words, such an agreement is not truly alternative. Under such circumstances, accordingly, specific performance has been allowed. *Crane v. Peer*, 43 N. J. Eq. 553; *National Provincial Bank v. Marshall*, 40 Ch. D. 112. It would seem, therefore, that the decision in the principal case may be supported, although the language of the court is wholly unjustifiable and misleading.

CONTRACTS IN RESTRAINT OF MARRIAGE. — Restrictions on marriage are regarded as against public interest, and consequently agreements operating in general restraint of marriage are held to be illegal. In a recent Ohio case, the plaintiff had contracted to serve the defendant's testator as housekeeper as long as he should live, and not to marry during that time, and the question arose as to whether or not the whole contract was rendered illegal, so as to bar the plaintiff's recovery, although in fact she had not married, and had faithfully performed her services as housekeeper. *King v. King*, 59 N. E. Rep. 111. It may be stated as a broad rule that a consideration void in part will support a promise, while a consideration partially illegal or *contra bonos mores* will not. *King v. Sears*, 2 Crompt. M. & R. 48; *Leake on Contracts*, 3d ed. p. 677. In the principal case the court argue that, as it is lawful for one not to marry, it is lawful for one to promise not to marry, and consequently the consideration being merely void in part, the case comes under the doctrine of *King v. Sears*, *supra*. Similar reasoning might be applied to the analogous cases of contracts, in which a covenant in restraint of trade forms a part of the consideration. Courts hold, however, that such a covenant is not merely an insufficient or invalid consideration, but a vicious one, that renders the whole contract illegal. *Bishop v. Palmer*, 146 Mass. 469. Whether a promise for a money consideration not to marry or not to trade be called illegal, or simply void, is a matter of terminology. Such a promise is certainly contrary to the spirit of the law, and it is entirely a question of policy whether or not it should vitiate the transaction of which it forms a part.

Even admitting for the moment that the contract in the principal case was illegal, it might still be urged that the plaintiff was entitled to recover for her services as housekeeper. *Leake on Contracts*, 3d ed. p. 635; *Duval v. Wellman*, 124 N. Y. 156. In the above cited case a widow, who had advanced money under a marriage brokerage contract, admittedly illegal, was allowed to recover, the court holding that two parties may concur in an illegal act and yet not be *in pari delicto*. It would seem, however, inconsistent in the principal case to pronounce the transaction as a whole illegal, and yet allow the plaintiff to recover the very amount that she would obtain under the contract if deemed valid. Although, in

general, agreements in restraint of marriage are invalid, there is a limitation to the rule that must be observed. Of necessity there are many contracts that restrict marriage incidentally, owing to the nature of the services performed. A good test as to whether a contract should be deemed illegal as a whole may be taken from analogous cases in the law of property. Where, under a will, there is a condition that the property be forfeited on the legatee's marrying, the condition is void. *Morley v. Reynoldson*, 2 Hare, 570. Where, however, a devise is made to be forfeited on the devisee's marrying, if it appear that the object of the devise is to provide for the devisee while single, and not to restrict his marriage, the devise is valid, even though the devisee may be induced to remain single in order to enjoy the benefits of the property. *Arthur v. Cole*, 56 Md. 100. In the principal case, the court regarded the services of housekeeper as the main engagement, and the promise not to marry as merely incident thereto. The object of the transaction was not to restrict marriage in any way, but to have the services performed by a single woman. The court held that such a transaction was valid and enforceable, and though in a *dictum* the court perhaps goes too far in saying it was immaterial whether the plaintiff married or not, the decision, it would seem, reaches a correct result. See 12 HARVARD LAW REVIEW, 424.

DOUBLE INHERITANCE TAXES. — In these days of expensive wars of colonization, and consequent increased taxation, the way of the legatee is hard. Succession taxes are both heavy and rigidly enforced. But the most conspicuous instance of exacting the uttermost possible farthing from a beneficiary under a will is to be found in a recent English case. A father devised certain freehold estates to his son. The son died in the lifetime of his father, leaving issue which survived the father, and devising his property to trustees upon certain trusts. Section 33 of the Wills Act provides that where property is devised to a child of the testator, who dies in the testator's lifetime, leaving issue which survives the testator, such devise "shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator." The Finance Act, 57 and 58 Vict. c. 30, secs. 1 and 2, enacts that an estate duty shall be levied on all property passing at a person's death, of which the deceased was at the time of his death competent to dispose. The crown collected an inheritance tax from the father's estate, and then claimed a further tax on the same property from the executors of the son. The court held that the effect of section 33 of the Wills Act was to pass the real estate to the child in fee, to devolve as part of his property, and consequently that it was subject to a second inheritance tax from his executors. *Re Scott (deceased)*, 83 L. T. Rep. 613.

It has been forcibly contended that the effect of section 33 of the Wills Act is not a fictitious projection forward of life or postponement of death on the part of the devisee, but that the statute must be construed with its object in mind — to do for a testator what he himself would have done had he thought of the contingency that has arisen. 1 Underhill, Wills, 454. It is extremely probable that the framers of the act never contemplated that it would have any such effect as that given to it by the construction adopted in the principal case — which, indeed, if pressed to its logical conclusion, might produce the absurdity of a constructive bigamy,

to say nothing of a constructive murder. *Re Scott*, [1900] 1 Q. B. 372, 382. Nevertheless this construction is supported by several earlier cases. *Executors of Perry v. The Queen*, L. R. 4 Ex. 27; *Eager v. Furnival*, 17 Ch. D. 115. And it is extremely difficult to overcome the obstacle raised by the express provision of the statute that the devise shall take effect as if the death of the devisee "had happened immediately after the death of the testator." Possibly, had the question not been prejudiced by these earlier cases, more consideration might have been given to the argument of the counsel for the executors that the true effect would be given to the act, not by creating a fiction, but by causing the child's will to be read as part of the father's, supported as this contention is by the mode adopted in the United States of construing similar sections of the state acts. *Snydam v. Voorhees*, 43 Atl. Rep. 4 (N. J.); *Newbold v. Pritchett*, 2 Whar. Pa. 46. It is true that the American statutes are not phrased in precisely the same terms as the English act — generally, indeed, expressly providing that the issue of the devisee shall take the estate devised, Conn. Gen. Stat. 1875, tit. 18, ch. 11, p. 370, or, as in Pennsylvania, that such devise "shall be good and available in favor of such surviving issue" of the devisee, "with like effect as if such devisee had survived the testator." Bright. Purd. Digest, 1700-1872, vol. 2, p. 1476. The American courts contend that to hold that the original devisee took an interest would entirely defeat the objects for which these sections were inserted — namely to benefit the more remote descendants of the testator, and not to give scope to the caprices of the devisee by a distribution under his will, or to provide for the payment of his creditors.

The precise question of the principal case probably would not arise in New York or in several other States where the inheritance tax is expressly levied on the property of which a party dies "seised or possessed." N. Y. Laws of 1887, ch. 713, §1. In Massachusetts and possibly in a majority of the States, however, the statute imposes the tax generally on all property "which shall pass by will or by the laws of the Commonwealth regulating intestate succession," and is thus substantially similar to the English Act. Mass. Laws of 1891, chap. 425.

THE PROTECTION OF THE STATE HOUSE AT BOSTON. — The statute of 1899, enacted with the object of protecting the State House at Boston from the encroachments of high buildings, has recently been passed upon by the Supreme Court of Massachusetts. The act provided that all buildings within a small district west of the State House should be limited to the height of seventy feet, and that, in so far as the act or proceedings to enforce it might deprive any person of rights existing under the Constitution, compensation should be recoverable by petition. Mass. Laws of 1899, c. 457. On petition by several owners of land affected to have the amount of their damages assessed, a demurrer was interposed by the state, the attorney-general contending that the statute was a valid exercise of the police power, and hence that no constitutional right was infringed so as to give the petitioners a claim for compensation. The court, however, speaking through Chief Justice Holmes, overruled the demurrer. They held that the statute could not be construed as a legislative adjudication that the public welfare required that this property should be so restricted without compensation in the exercise of the police power,

and that consequently there was a deprivation of rights under the Constitution for which compensation was recoverable. In explanation of this construction the court said that in such an extreme case as this, the purpose of the act being one of luxury rather than of necessity, the legislature would have stated more clearly that the police power was to be relied on, if such had been their intent. The legislature not having expressly declared that this was to be an exercise of the police power, it was not for the court to do so, they said, and thus since for the public use a property right was taken away, — the right to build above seventy feet, — compensation must be given in accordance with the express terms of the act. *Parker v. Commonwealth* (not yet reported).

It is not easy to agree with the construction put upon the statute by the court. The act unqualifiedly forbids building above a height of seventy feet within a certain prescribed area, and in a separate section provision is made for the assessment of damages in case any rights under the Constitution are taken away by the act. Construing the statute with reference both to the legislation of 1898 in regard to Copley Square and the *dictum* of this same court that such a restriction upon the height of buildings might well be within the police power, — *Attorney-General v. Williams*, 174 Mass. 476, — it would seem that the legislative intent was that no compensation be given if that could be done constitutionally, and that the arrangement for provisional compensation was to save the statute from being declared void in case the court should decide that this was not a lawful exercise of the police power. Moreover, the chief justice's conclusion, that "the rights existing under the Constitution" for which compensation is to be made refer to the right of every man to build beyond the prohibited height, seems somewhat strained. The more natural meaning is the right to receive compensation where property is taken by the state under the power of eminent domain. A possible explanation of the strained construction put upon this statute is that the court were not agreed as to whether or not such a regulation could be a legitimate exercise of the police power, and that this expedient was adopted — and fully so — to avoid the rendering of a decision by a divided court.

As to the question expressly left open by the court, whether this purpose could lawfully be effected by a police regulation without payment, the right is conceded in the *dictum* of this court in *Attorney-General v. Williams*, *supra*; and on principle it seems more in the nature of a regulation of how a man shall use his property than an actual taking of property, as some of the petitioners contended. See 13 HARVARD LAW REVIEW, 405. Consequently broad principles of constitutional construction would seem to admit of power in the legislature to make such a restriction without being under any legal duty to furnish compensation. The existence of the moral duty to do so in such a case is, of course, self-evident. As to the legal obligation, however, it must be remembered that the powers of police of a state are coextensive with the residuary legislative power, after the federal and local constitutional prohibitions on the power of the state, together with the more specific legislative powers, taxation, eminent domain, etc., are taken away. Thus the legislature has power to make all manner of regulations for public purposes, and the question is, in substance, not whether any given statute is within the police power, but whether due process of law has been observed, whether the act may reasonably be called a legitimate exercise of legislative power. This brings us to the question whether the purpose of the stat-

ute was a public or a private one; for if the latter, the act would be unreasonable. Admittedly, land may be taken for a public park or for a public square or boulevard under the right of eminent domain, and the public moneys raised by taxation may be expended in beautifying such places. And of course both eminent domain and taxation must be for a public use. Thus it is clear that a legislative purpose is none the less a public one because it is for the adornment and beautifying of a city. So here the avowed object of this act was to "save the dignity and beauty of the city at its culminating point for the pride of every Bostonian and for the pleasure of every member of the state." And the criterion of what is a public use is certainly the same in the exercise of the police power as it is in taxation and eminent domain. Thus the statute in question being a reasonable regulation, — its reasonableness seems unquestionable, — and for what is now generally recognized as a public use, although working harm, perhaps, to those affected by its provisions, might well have been considered a constitutional exercise of the police power of the state.

RECENT CASES.

BANKRUPTCY — ASSIGNMENT FOR BENEFIT OF CREDITORS — LEASES. — *Held*, that an assignee for benefit of creditors does not, by accepting the trust, necessarily become assignee of a lease of the debtor, but may within a reasonable time elect to reject it. *Wilder v. McDonald*, 59 N. E. Rep. 106 (Ohio).

A general assignment is sufficient to pass title to a lease, though it be not specifically mentioned. *Love v. Mason*, 140 Ill. 108, 113. And ordinarily the assignee of a lease, by accepting the deed, is held to accept the lease and render himself liable to its burdens. *Smith v. Goodman*, 149 Ill. 75, 80. However, it has become well established in this country, in accord with the present case, that an assignee for the benefit of creditors by accepting the deed merely accepts the trust, and that therefore he may enter upon the execution of the trust without becoming assignee of the lease, unless he elects to do so within a reasonable time. *Smith v. Goodman*, *supra*; *United States Trust Co. v. Wabash Western Ry. Co.*, 150 U. S. 287, 289. **BURRELL, ASSIGNMENTS**, 5th ed. 596. This is analogous to the universal rule as to trustees in bankruptcy. *Hanson v. Stevenson*, 1 B. & A. 305. On principle, it seems entirely sound, for, in view of the purpose of the assignment, it cannot be within the scope of the trust to accept burdensome property which goes to diminish the fund arising from other sources, and tends to defeat the object of the assignment.

BANKRUPTCY — EXEMPTIONS — LIFE INSURANCE POLICIES. — The Bankrupt Act of 1898, § 6, provides that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws." § 70 vests the bankrupt's title to property in the trustee "except in so far as it is exempt, provided that if he assures to the trustee the cash surrender value of any insurance policy payable to his estate, he may hold the policy free from the claims of creditors; otherwise the policy shall pass to the trustee as assets." The bankrupt held a policy in his own favor which was exempt under the state law. *Held*, that the policy, in the absence of security for its cash surrender value, passes to the trustee as assets. *In re Scheld*, 104 Fed. Rep. 870 (C. C. A., Ninth Cir.).

Held, that such a policy is exempt in proceedings under the Act. *Steele v. Buel*, 104 Fed. Rep. 968 (C. C. A., Eighth Cir.).

This question was first considered by a district court of the eighth circuit, and it was held that the policy was not exempt. *In re Lange*, 91 Fed. Rep. 361. That early decision is relied upon in the first of the cases above, and has been accepted without discussion of its merits by all the text-writers. **LOVELAND, BANKR.**, p. 511; **LOWELL**,

BANKR., p. 320. *In re Lange*, *supra*, is, however, overruled in the second of the principal cases, which is an appeal from a similar decision of the same court. The authorities in favor of the first case, therefore, are not formidable, and upon principle it seems clearly unsound. The language of § 6 could not more forcibly declare the rule of exemption for the entire act. The intent to make an exception thereto should be evinced with equal certainty. The limitation in § 70, "except as to such property which is exempt," seems to recognize the paramount authority of § 6, and to disclaim any intention to create any exceptions thereto. Such an interpretation retains the rule of the preceding act as to exemptions, while at the same time lessening the hardship where by the state law no exemption is allowed. *In re Sawyer*, Fed. Cas. No. 12393.

BANKRUPTCY — JURISDICTION — RIGHTS OF CREDITORS. — Before adjudication in involuntary bankruptcy proceedings, the petitioning creditors applied to the bankruptcy court for an injunction to restrain a third party from disposing of property in his possession alleged to belong to the bankrupt. *Held*, that the Federal courts have no jurisdiction in such a case without the consent of the defendant. *In re Ward*, 104 Fed. Rep. 985 (Dist. Ct., Mass.).

In a number of early cases this jurisdiction was sustained. *In re Rockwood*, 91 Fed. Rep. 363; *In re Gutwillig*, 92 Fed. Rep. 337. The court, however, regards these cases as overruled by *Bardes v. Harwarden Bank*, 178 U. S. 524. That case decided that under § 23 b the bankruptcy courts have no jurisdiction over plenary suits by the trustee without the consent of the defendant. But it may well be contended that the effect of the decision has been overestimated. Granted that the trustee, being incapable of bringing plenary suits, cannot be allowed to obtain a temporary injunction in the bankruptcy courts, there seems to be no reason to apply the restrictions imposed upon the trustee to a suit by the creditors. The trustee is only slightly inconvenienced by being compelled to bring suit in the state courts, but the creditors would practically be deprived of all remedy, for it is exceedingly doubtful if an injunction could be obtained from the state courts upon a suggestion of possible bankruptcy. The omission of creditors from § 23 b and the provisions of § 2 (15) seem to indicate an intention to provide a remedy for just such a case.

BILLS AND NOTES — AGENT FOR COLLECTION — DEDUCTION FOR PAST INDEBTEDNESS OF AGENT. — The plaintiff, having a check drawn on the defendant bank, indorsed it in blank and gave it to his father, with instructions to collect it. The bank, thinking it belonged to the father, with his consent deducted a debt due from him. *Held*, that the plaintiff may recover the amount so deducted. *Percival v. Strathman*, 84 N. W. Rep. 929 (Iowa).

The transaction here amounted to full payment of the check by the bank, and repayment by the father of his debt to the bank. *Cf. Oddie v. National City Bank*, 45 N. Y. 735. The decision seems, therefore, incorrect, for if this had in fact been done, the bank would clearly be entitled to retain the amount as a purchaser for value without notice. *Cf. Swift v. Tyson*, 16 Pet. 1; 3 HARV. LAW REV. 138. No authority has been found on the exact point of the case.

BILLS AND NOTES — INDORSEMENT — GUARANTY. — The defendants, payees of a negotiable note, signed the following indorsement upon it: "For value received we hereby guarantee the payment of the within note at maturity, waiving demand, notice of non payment, and protest." *Held*, that this operates as an indorsement with enlarged liability, and defendants are liable only on being charged as indorsers. *National Exch. Bank v. McElfresh Mfg. Co.*, 37 S. E. Rep. 541 (W. Va.).

This decision is supported by some authority. *Partridge v. Davis*, 20 Vt. 499; *Dunham v. Peterson*, 5 N. D. 414. The more widely accepted view, however, seems to be that such a contract operates only as an ordinary guaranty, not as an indorsement. *Central Trust Co. v. First National Bank of Wyandotte*, 101 U. S. 68; *Tuttle v. Bartholomew*, 12 Met. 452. This view seems correct, for the express and special contract clearly negatives the existence of the ordinary contract of indorsement which is implied by custom from the usual blank form of indorsement. This contract should have no different effect when upon the note than if it were a separate instrument. Moreover, though the contract here makes the point unessential in this case, demand and notice of non-payment are not necessary to charge the guarantor in such cases. *Walton v. Marcell*, 13 M. & W. 452; *Clay v. Edgerton*, 19 Ohio St. 549. *Contra, Douglas v. Reynolds*, 7 Pet. 113, 126. Consequently, the rule adopted in the present case changes the whole nature of the contract, both inserting unintended conditions

on the guarantor's liability, and extending the scope of that liability to more remote holders. It is, therefore, not to be supported.

CARRIERS — GRATUITOUS TRANSPORTATION — FELLOW SERVANT RULE. — The plaintiff, an employee of a street railway company, while riding home from work under a rule allowing employees to ride free of charge, was injured by the negligence of the motorman. *Held*, that at the time of the accident the plaintiff was a passenger and not a fellow-servant of the motorman, and was therefore entitled to recover. *Dunkinson v. West End St. Ry. Co.*, 59 N. E. Rep. 60 (Mass.).

Unless the plaintiff, when the accident occurred, was engaged in the actual service of the defendant, or in some act closely connected with such service, it is generally held that the fellow-servant rule does not apply. *State v. Western R. R. Co.*, 63 Md. 463. A result opposed to that of the principal case was reached in two cases where the plaintiff was riding to his work instead of from it. *Sawyer v. Boston & Maine R. R. Co.*, 80 Mass., 466; *Holmes v. Great Northern Ry. Co.*, [1900] 2 Q. B. 409. This difference in the facts, however, appears not to have influenced the courts, and seems insufficient to distinguish the cases. Accordingly, the first of these cases must be considered as overruled by the present decision. On the facts, the principal case is clearly within the rule stated above, and the result is therefore to be commended. *O'Donnell v. Alleghany R. R. Co.*, 59 Pa. St. 239.

CONFLICT OF LAWS — PENALTIES — STATUTORY LIABILITY OF DIRECTORS. — A South Dakota statute provided that directors of a corporation creating debts in excess of the subscribed capital stock should be individually liable to the full amount of the debt contracted. *Held*, that such liability is enforceable in Vermont against the estate of a deceased director of a South Dakota corporation. *Farr v. Briggs's Estate*, 47 Atl. Rep. 793 (Vt.).

Whether statutory liabilities not of a compensatory nature, which run in favor of individuals as distinguished from the state, are penalties unenforceable in other jurisdictions, is a question of some difficulty. The Supreme Court in *Huntington v. Attrill*, 146 U. S. 657, holds, in what may well be regarded an *obiter* discussion, that they are not penalties in the international sense, whereas the general rule in state courts is that they are. *Halsey v. McLean*, 12 Allen, 438; *O'Reilly v. New York, etc. R. R.*, 16 R. I. 388; *Coffey v. Dodge*, 167 Mass. 231. The principal case at first sight might seem to support the view of *Huntington v. Attrill*, *supra*, but is in reality distinguishable. The act of the directors to which the statute here relates is the creation of the debt; the damage resulting from non-payment is the whole amount. For this the statute provides compensation, and virtually makes the director surety from the beginning. *Fried v. Haines*, 28 Fed. Rep. 919. In *Huntington v. Attrill*, however, the debt from the corporation already existed when the directors made their false report, and its value may or may not have been affected by it. Imposing in such case a liability for the whole debt is not giving compensation for the result of the directors' act, but fixing an arbitrary penalty. *Derrickson v. Smith*, 27 N. J. Law, 166. This distinction is overlooked in *First Nat. Bank v. Price*, 33 Md. 487, where a result opposed to that in the principal case is reached.

CONSTITUTIONAL LAW — EXTRADITION — POWER OF FEDERAL GOVERNMENT. — An act of Congress provided for the extradition of criminals in certain cases "to foreign countries or territories . . . occupied by or under the control of the United States." *Held*, that the act was constitutional as applied to the extradition to Cuba of a fugitive charged with having embezzled public funds. *Neeley v. Henkel*, 21 Sup. Ct. Rep. 302. See NOTES, p. 607.

CONSTITUTIONAL LAW — RETROACTIVE LAWS — FIFTH AMENDMENT. — A mortgage on cattle in Indian Territory had been executed by a non-resident, and recorded in the county where the cattle were. By the laws of Indian Territory this mortgage was of no effect against any third persons. A creditor of the mortgagor, with knowledge of the mortgage, attached the cattle, and got judgment; but the mortgagee had intervened and his claim had not been adjudicated, when Congress passed a statute for Indian Territory validating all such mortgages "heretofore executed." *Held*, that this statute is constitutional as against this attaching creditor. *Evans-Smiley Buell Co. v. McFadden*, 105 Fed. Rep. 293 (C. C. A., Eighth Cir.). See NOTES, p. 600.

CONTRACTS — CONSIDERATION VOID IN PART — RESTRAINT OF MARRIAGE. — The plaintiff agreed not to marry, and to act as housekeeper for the defendant during his life, in consideration that the defendant promised to provide enough to make her comfortable. *Held*, that the plaintiff, having fully performed, can recover on the contract, the promise not to marry, though void on grounds of public policy, not vitiating the entire consideration. *King v. King*, 59 N. E. Rep. 111 (Ohio). See NOTES, p. 614.

CONTRACTS — PART PAYMENT — UNLIQUIDATED CLAIMS. — *Held*, that an unliquidated claim is not discharged by the acceptance, in full satisfaction, of a sum less than the debtor admits to be due. *Huff v. Logan*, 60 S. W. Rep. 483 (Ky.).

The doctrine of *Fokes v. Beer*, 9 App. Cas. 605, that the payment of a lesser sum is no consideration for the relinquishment of a larger claim, is always stated to be inapplicable where the larger claim is unliquidated. *Wilkinson v. Byers*, 1 A. & E. 106; 12 HARV. LAW REV. 521-531. The basis of this distinction seems to be that as the claim was unliquidated, it might have turned out that the payment was full satisfaction. The exception has, however, been applied even where the amount paid was exactly what the debtor admitted to be due. *Ostrander v. Scott*, 161 Ill. 339; *Tanner v. Merrill*, 108 Mich. 58. These latter cases are indistinguishable on principle from the principal case and from *Fokes v. Beer*, *supra*. If the fact that the smaller amount is admitted to be due will prevent its being consideration for the abandonment of the whole claim, this should be true equally when the debtor pays all that he admits to be due, and the reason for the decisions in the ordinary case of unliquidated claims manifestly does not apply. The decision of the principal case is therefore to be commended from the point of view of uniformity.

CORPORATIONS — JUDGMENT AGAINST CORPORATION — LIABILITY OF STOCKHOLDERS. — The plaintiff, having recovered judgment against a corporation upon an *ultra vires* contract, proceeded against the defendant on the judgment under a constitutional provision making stockholders liable for dues of corporations. *Held*, that *ultra vires* contracts are not included within the term dues, and that accordingly the defendant is not liable. *Ward v. Joslin*, 105 Fed. Rep. 224 (C. C. A., First Cir.).

It is well settled that a judgment against a corporation is conclusive against its stockholders. *Thayer v. New England, etc. Co.*, 108 Mass. 523; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640. The principal case indicates a necessary exception that the judgment may be examined to see if the cause of action is one for which liability is imposed upon the stockholders. *Behn v. Brown*, 33 Mich. 257; *Wilson v. Pittsburgh, etc. Co.*, 43 Pa. St. 424. The result reached by the court seems to be a fair interpretation of the constitutional provision. Without this there would be no liability whatever, and it should not be presumed that so sweeping a change was intended as to create liability for all corporate acts however unauthorized. It has been held that the defence of *ultra vires* is not open to stockholders in a suit by creditors of the corporation upon their unpaid stock subscriptions. *Baines v. Babcock*, 95 Cal. 581. But this is upon the ground that the creditor is thereby reaching assets of the corporation. This is inapplicable to the principal case, where the statutory liability sought to be enforced is owed by the shareholders directly to the creditors, and is in no way an asset of the corporation. *Whitman v. Oxford Nat. Bank*, 176 U. S. 559; 2 MOR. CORP., 2d ed., § 870.

CORPORATIONS — PUBLIC CORPORATIONS — GARNISHMENT. — *Held*, that the Board of Commissioners of the Yazoo and Mississippi Delta cannot be required to answer as garnishee, since it is a public corporation, organized for public purposes. *McBain v. Rodgers*, 29 So. Rep. 91 (Miss.).

Since the national and state governments cannot be made parties to suits in their own courts, they are not liable to answer as garnishees. *Buchanan v. Alexander*, 4 How. 20; *Stillman v. Isham*, 11 Conn. 123. Counties, being usually regarded as administrative subdivisions of the state, have likewise been exempted. *Ward v. County of Hartford*, 12 Conn. 404. Cities, however, have been treated as public corporations, rather than as subdivisions of the sovereign, and on that ground have sometimes been held subject to such process. *Newark v. Funk*, 15 Ohio St. 462. Counties have also been so regarded by some courts. *Adams v. Tyler*, 121 Mass. 380. The weight of authority, however, favors the exemption of municipalities and other public corporations because of the undoubted public injury and inconvenience which would result if all the debts of such a corporation were subject to garnishment. *Mervin v. Chicago*, 45 Ill. 133; *Hawthorn v. St. Louis*, 11 Mo. 59. Some decisions have distinguished be-

tween garnishment of the salaries of officials, which should clearly not be allowed, and garnishment of ordinary debts of the city. Such a distinction, while illogical, is perhaps practically justifiable. *Mayor of Jersey City v. Horton*, 38 N. J. Law, 88.

CRIMINAL LAW — PLEA OF GUILTY — VACATING SENTENCE. — The defendant, on being indicted for receiving stolen property with knowledge that the same was stolen, pleaded guilty, and was sentenced to imprisonment. He subsequently moved the court to vacate the sentence, and for leave to withdraw his plea of guilty, and to plead not guilty. Evidence showed that he had all along denied having had guilty knowledge, and had pleaded guilty only because of the assurance of the prosecuting witness that the judge would set him free. *Held*, that the sentence should be vacated, and the defendant allowed to plead not guilty. *People v. Atkins* (Criminal Ct., Cook Co., Ill.), 33 Chicago Legal News, 192. See NOTES, p. 609.

EQUITY — BILL OF PEACE — DAMAGES. — Several actions at law for nuisance were begun against a smelting company by neighboring property owners. The company brought a bill to perpetually enjoin all these suits on the ground that certain facts alleged constituted a common legal defence to all the actions. The lower court dismissed the bill for want of jurisdiction, except as against three defendants, who waived objection on that score, and as against these found that the alleged defence to the actions at law was not made out. *Held*, that the defendants who submitted to the jurisdiction are entitled to have the equity court assess damages for the nuisance. *Ducktown Sulphur, etc. Co. v. Barnes*, 60 S. W. Rep. 593 (Tenn., Sup. Ct.). See NOTES, p. 611.

EQUITY — INJUNCTION — TRADE NAMES. — Plaintiffs for many years had used Nolan Bros. as a trade name in the retail shoe business. The defendant and his brother, who were of the same family name as plaintiffs, later opened a wholesale shoe business, adopting the same trade name. The brother retired from the firm, and the defendant soon after changed from a wholesale to a retail business, continuing to use the same name, with intent to mislead and deceive the public. *Held*, that defendant will be enjoined from using the name Nolan Bros. *Nolan Bros. Shoe Co. v. Nolan*, 63 Pac. Rep. 480 (Cal.).

It is well settled that a person has the right to conduct a business in his own name, although another person has previously engaged in the same business with the same trade name. *Burgess v. Burgess*, 3 De G. M. & G. 896. If apart from the mere use of his name, however, the defendant does anything calculated to deceive the public, and thereby induce people to trade with him in the belief that they are dealing with the prior user of the trade name, an injunction will issue against the continuation of these false representations, but not against the further use of the name. *Croft v. Day*, 7 Beav. 84, 89; *Halloway v. Halloway*, 13 Beav. 209. It would seem that within these limits motive is immaterial. A person should never be restrained simply from doing business in his own name. Hence in granting an injunction because of the dishonest intent of the defendant the principal case is erroneous. There is some support on authority, however, for making the decision turn on such intent. *England v. New York Pub. Co.*, 8 Daly, 375. The additional facts shown — that one member of the firm has retired, and that there has been a change from a wholesale to a retail business — should not deprive the surviving partner of the right to continue to use the original firm name.

EQUITY — INTERPLEADER — PERSONAL DEFENCE. — Certain property insured by the defendant company was destroyed by fire, and the plaintiff and B both claimed the benefit of the policy and brought actions against the company. By the terms of the policy there was a complete defence against B, because his action was begun more than a year after the loss. In the plaintiff's action the company admitted liability, but sought by motion under the New York Code to interplead the plaintiff and B. *Held*, that the motion should have been granted, since the defence against B was purely personal and could be waived by the company. *Grell v. Globe, etc. Co.*, 55 N. Y. App. Div. 612.

There being nothing in the terms of the Code provision to determine this question, the decision must, according to the usual interpretation of such statutes, be guided by the principles of an ordinary bill of interpleader. *Wilson v. Duncan*, 11 Abb. Pr. 3, 8. Thus considered, two objections must be answered. The prospects of the original plaintiff may be materially injured by allowing the company thus to waive its defence against the other claimant; but apparently the plaintiff should have no more right to object

than a creditor has when his debtor pays a debt barred by the statute of limitations. 2 BIGELOW, *FRAUD*, 135. Again, it may be said that the only proper basis for interpleader is the fact that the obligor can in no other way escape the risk and vexation of double litigation of which there is no serious danger here. But this is a narrow view of an equitable doctrine, and it seems better to allow the stakeholder to waive a personal bar and secure payment of the money to the claimant justly entitled. No authority has been found on the point, but the decision commends itself.

EQUITY — NUISANCE — INJUNCTION. — The plaintiff, owner of a tenement house in a business section of the city of New York, prayed that the defendant might be enjoined from so operating his electric lighting plant as to injure the plaintiff's premises by vibration and soot. *Held*, that an injunction should be denied, as it would cause serious injury to the defendant, and to the public at large, with but a relatively slight benefit to the plaintiff. *Riedeman v. Mount Morris Electric Co.*, 67 N. Y. Supp. 391. See *NOTES*, 14 *HARV. LAW REV.* 458.

EQUITY PLEADING — STATUTE OF LIMITATIONS — DEMURRER. — *Held*, that in equity the Statute of Limitations cannot be taken advantage of by demurrer, even though the face of the bill shows a cause of action which is barred. *Hubble v. Poff*, 37 S. E. Rep. 277 (Va.).

The rule stated in this case is generally followed in actions at law. *Stile v. Finch*, Cro. Car. 381. In equity, however, a demurrer is generally allowed where the bill itself shows that the statute has run. *Hoare v. Peck*, 6 Sim. 51; *ANGELL, LIMITATIONS*, 6th ed., § 294. The decision in the principal case seems nevertheless to be correct on principle, for, by compelling the defendant to plead the statute, the plaintiff is allowed to show facts in his replication bringing his cause of action within some of the exceptions enumerated in the statute, an advantage of which he is unjustly deprived if the plaintiff can demur successfully merely because the bill shows that the statute has run. This objection to allowing the plaintiff to demur under such circumstances was stated in a well reasoned English decision, *Aggas v. Pickerell*, 3 Atk. 225, and though the rule there laid down was not followed, it was afterward recognized to be correct and adopted as a rule of practice under the Judicature Acts. *WILSON'S JUDICATURE ACTS*, 3d ed., Order xix. Rule 18.

EVIDENCE — CONFESSIONS — ADMISSIBILITY. — The officer in charge of defendant induced him to make confessions by threatening to deliver him to a mob. *Held*, that the confessions were not voluntary, and should therefore be rejected. *Whiteley v. State*, 28 So. Rep. 852 (Miss.).

A confession to be admissible must be voluntary. *Regina v. Garner*, 1 Den. C. C. 329; *Regina v. Taylor*, 2 C. & P. 733. Stephen states that "no confession is deemed to be voluntary if . . . caused by any inducement, threat, or promise, proceeding from a person in authority, and having reference to the charge against the accused person. . . ." *DIGEST OF EVIDENCE*, p. 76. On the other hand, confessions are admitted when made because of actual fear not produced by those in authority, *Comm. v. Smith*, 119 Mass. 305; or because of inducements, either not relating to the accusation, *State v. Tatro*, 50 Vt. 481; or not offered by one in authority, *Regina v. Moore*, 2 Den. C. C. 522. Under the influence of such decisions the subject has been treated in a technical way, as though Stephen, though not professing to exclude the possibility of other involuntary confessions, actually enumerates all there can be. If so, the confessions in the principal case were voluntary, but notwithstanding this the fact that they were obtained by duress is sufficient to justify their exclusion, and they have always been excluded. *Miller v. People*, 39 Ill. 457; *Young v. State*, 68 Ala. 569. In every case where the question has arisen in the courts, however, such confessions are said to be involuntary, and there seems to be no objection to adding this to the other cases enumerated by Stephen.

EVIDENCE — HANDWRITING — DOCUMENTS FOR COMPARISON. — *Held*, that only such papers, purporting to bear the signature of the party whose signature was the subject of controversy, as were in evidence in the case for other purposes or were conceded to be genuine, are admissible for comparison ordinarily, though occasions may arise where the latitude of the rule should be extended. *Bane v. Gunn*, 63 Pac. Rep. 634 (Idaho).

Originally, at common law, any writing proved genuine was probably admissible. 1 *GREENL. EV.*, 16th ed., § 578 a, note 2; *Allesbrook v. Roach*, 1 Esp. 351. In later years,

distrust of the jury and a desire not to complicate the issues led to the restriction of the rule in some cases to writings already in the case, *Doe d. Perry v. Newton*, 5 A. & E. 514; and the subject became much confused. See *Doe d. Mudd v. Suckermore*, 5 A. & E. 703. American courts are in hopeless conflict, the majority, perhaps, favoring the rule of *Doe d. Perry v. Newton*, *supra*. *Randolph v. Loughlin*, 48 N. Y. 456; *Kernin v. Hill*, 37 Ill. 209. Others admit also writing of undisputed genuineness. *Macomber v. Scott*, 10 Kan. 335. The unsatisfactory state of the law in England was remedied by statutes, allowing comparison "with any writings proved to the satisfaction of the judge to be genuine." 17 & 18 VICT. c. 125, § 27. Statutes to the same effect are common in this country, while some courts have reached the same result without a statute. *Moody v. Rowell*, 34 Mass. 490. Such a rule seems preferable to that in the principal case.

EVIDENCE — WITNESSES — SCOPE OF CROSS-EXAMINATION. — *Held*, that a party has no right to cross-examine any witness, except as to facts connected with matters stated in the direct examination. *State v. Hatfield*, 37 S. E. Rep. 626 (W. Va.).

The principal case adopts the practice followed in the Federal courts, and in probably a majority of the state courts. *Philadelphia, etc. R. R. Co. v. Stimpson*, 14 Pet. 448, 461; *People v. The Court, etc.*, 83 N. Y. 436, 459. In England, however, a witness called by one party to prove the simplest fact may be cross-examined by the adverse party on every issue of the case. *Dickinson v. Shee*, 4 Esp. 67. And this is the practice in a few of our states. *Moody v. Rowell*, 17 Pick. 490, 498; *State v. McGee*, 55 S. C. 247. Upon practical grounds the English rule, although it allows the cross-examiner to prove his case by leading questions, seems preferable. It avoids a distinction between facts connected with matters stated in the direct examination and facts not so stated, which is often difficult to draw, and is always the source of unprofitable quibbling. The English practice, moreover, is more conducive to the ascertainment of the truth; since by giving the cross-examiner a free hand, the opportunity for concealment or fabrication by the witness is materially lessened. THAYER, CAs. ON EV., 2d ed., 1207, 1222-1225. The decision of the principal case is, therefore, to be regretted.

EVIDENCE — WITNESSES — WAIVER OF PRIVILEGE. — *Held*, that the defendant in a criminal prosecution, by offering himself as a witness in his own behalf, does not waive his privilege not to answer incriminating questions asked to impeach his credibility. *Bachner v. State*, 58 N. E. Rep. 741 (Ind.).

It is often stated that a defendant in a criminal prosecution, when he elects to testify, has the same rights as other witnesses. But where an ordinary witness may refuse any testimony tending to incriminate, the defendant is generally compelled to answer to all questions, which, on other grounds, might properly be asked in cross-examination. *Commonwealth v. Mullen*, 97 Mass. 545. As the defendant's permission to testify may properly be granted only on condition that he clear up the whole matter, and not prejudice the jury in his behalf by testimony on certain facts only, this broad waiver is clearly justified. However, concerning questions merely touching his credibility, his privilege ought still to exist. No concealment of pertinent facts would thereby result, and otherwise the jury might be unfairly prejudiced by the defendant's commission of entirely distinct crimes. This distinction between questions relevant to the issue, and those affecting credibility, which the principal case in effect recognizes, is accepted by most of the authorities. *Clarke v. State*, 78 Ala. 474; *People v. Pinkerton*, 79 Mich. 110.

HABEAS CORPUS — REMOVAL OF CHILD BEYOND JURISDICTION. — Defendant, intrusted with a child in New York, bound it out to service in another state. *Held*, that a writ of *habeas corpus* will not issue in New York to compel its delivery to the father. *People ex. rel. v. New York Juvenile Asylum*, 68 N. Y. Supp. 279 (Sup. Ct., App. Div., First Dept.). See NOTES, p. 612.

INSURANCE — EXECUTION FOR CRIME — INNOCENCE OF INSURED. — The insured, though in fact innocent, was convicted of a capital crime by a court of competent jurisdiction and executed. The policy, which contained no provision for forfeiture in the event of execution for crime, had been taken out by the insured for the benefit of his wife, and later assigned to creditors of the insured. *Held*, that they cannot enforce the policy. *Burt v. Union, etc. Ins. Co.*, 105 Fed. Rep. 419.

The decision is rested on the ground that to permit a recovery in such a case would

tend to encourage a want of confidence in the efficiency of our courts. Yet by a decided preponderance of authority a judgment rendered in a criminal prosecution cannot be received in a civil cause as evidence of the facts on which it is based, although the same questions of fact may be in issue in both. *Betts v. New Hartford*, 25 Conn. 180; *Corbley v. Wilson*, 71 Ill. 209. *Contra, Anderson v. Anderson*, 16 Am. Dec. 237, 238. Moreover the decision cannot be supported on any ground. It is well settled that if the insured takes out a policy for his own benefit and suffers death because of a crime committed by him, his personal representatives or those claiming under him cannot enforce the policy. *Amicable Society v. Bolland*, 4 Bligh, 194; *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 130. Where, however, the plaintiffs claim in their own right, they can recover even though the death has resulted from the commission of a crime by the insured. Thus where the policy is made payable to the wife of the insured, and he commits the crime of suicide, she can enforce it. *Morris v. Life Assurance Co.*, 183 Pa. St., 563, 572; *Darrow v. Family Fund Society*, 116 N. Y. 537. See, also, *Seiler v. Life Association*, 105 Iowa, 87, 93. The reason for the difference between the two classes of cases seems to be that public policy is against allowing the insured's estate to derive a benefit from his crime. But this policy breaks down where a third party is suing in his own right. The principal case is therefore wrong, both because the insured was innocent, and because the suit is brought in the right of a named beneficiary other than the insured.

JUDGMENTS — PARTIES — SETTING ASIDE DECREE OF DIVORCE. — In 1894 A secured a divorce from B. and later married C, who died intestate in 1897. C's heirs at law brought suit to set aside the decree of divorce for fraud, to prevent A from acquiring C's estate, which would otherwise descend to them. *Held*, that the plaintiffs, being strangers to the divorce suit and having no interest therein, cannot maintain this action. *Tyler v. Aspinwall*, 47 Atl. Rep. 755 (Conn.).

Some courts hold that a decree of divorce is final and can never be set aside, even under a general statute allowing the reopening of judgments. *O'Connell v. O'Connell*, 10 Neb. 390. This rule rests upon the inconvenience which would result to the collateral rights of third parties. *Parish v. Parish*, 9 Ohio St. 534. The general rule, however, is that judgments in divorce suits, like those in any other action, may be vacated by proper application, on showing good cause. *Holmes v. Holmes*, 63 Me. 420; *Johnson v. Coleman*, 23 Wis. 452. But the right to interfere with a judgment is generally limited to parties to the action, *Drexel's Appeal*, 6 Pa. St. 272, and while there are some instances where a third party can have a judgment vacated, he must show a direct injury to his interests by the fraudulent decision. *Shallcross v. Deats*, 43 N. J. Law, 177. In the principal case, the interest of the plaintiffs in the judgment attacked was indirect, since it did not in itself affect them, and the court therefore properly declined to entertain their action.

PATENTS — INFRINGEMENT — SHIPMENT FOR SALE ABROAD. — The defendants *bona fide* purchased articles made in infringement of the plaintiff's patent, and shipped them to their agent in Paris, where they were sold. *Held*, that as the defendants had the articles in their possession for purposes of resale, they are liable for an infringement, although there was no actual exposure for sale in England. *British Motor Syndicate v. Taylor*, [1901] 1 Ch. 122.

The defendants' liability necessarily depended upon whether or not their possession of the articles in England amounted to an infringement, for the sale in Paris could not infringe an English patent. *Brown v. Duchesne*, 19 How. 183. Mere possession of an article made in infringement of another's patent is not necessarily an infringement. *Nochel's Explosives Co. v. Jones*, 8 App. Cas. 1. It is, however, if the possession is so used as to threaten the exclusive rights given by the patent. *United Telephone Co. v. London, etc. Co.*, 26 Ch. D. 766, 776. The innocence of the infringer is, of course, immaterial. *Parker v. Hulme*, 1 Fish. Pat. Cas. 44. In the principal case the defendants used their possession to forward articles made in infringement of the plaintiff's patent to a point outside England, where they could be sold with impunity. This action was clearly a user of possession which encroached upon the exclusive right "to make, use, exercise, and vend" given the plaintiff by his patent, and the decision is therefore correct.

PROPERTY — EJECTMENT — PRIOR POSSESSION OF PLAINTIFF. — *Held*, that proof of possession, at the time of ouster by the defendant, at least if under color of right, raises a presumption of title sufficient to maintain ejectment against a mere intruder. *Bradshaw v. Ashley*, 21 Sup. Ct. Rep. 297.

In actions of ejectment where the plaintiff has not been in possession of the land, or the defendant occupies under a claim of title, the plaintiff can show a right to possession only by connecting himself with the legal title. *Greenleaf v. Brooklyn, etc. Co.*, 141 N. Y. 395. See 10 AM. & ENG. ENCY. OF LAW, 2d ed., 481. But where the defendant, a mere intruder without color of right, has ousted the plaintiff from actual possession, it is sufficient for the plaintiff to show prior possession and ouster. *Davidson v. Gent*, 1 H. & N. 744. In such cases the plaintiff recovers, not because possession raises a presumption of title, but because possession even of a wrongdoer is sufficient title to maintain ejectment against a subsequent intruder. Cf. *Asher v. Whitlock*, L. R. 1 Q. B. 1. The reasoning of the court in the principal case is unfortunate, since, if prior possession merely raises a presumption of title, the plaintiff would be defeated on proof of an outstanding title, and such an interpretation of similar erroneous language has been applied in some cases where the defendant had ousted the plaintiff without color of right. See *Nagle v. Shea*, 8 Ir. Rep. C. L. 224.

PROPERTY — EQUITY — MORTGAGE ON FUTURE PROPERTY. — One X leased a brickyard from the plaintiff, giving him a mortgage of the clay in the bank, and the brick he should make therefrom, for any unpaid rent. The defendant, without notice of the mortgage, bought from X bricks subsequently made. Held, that the mortgage did not create a lien on these bricks. *Townsend, etc. Co. v. Allen*, 62 Pac. Rep. 1008 (Kan.).

Mortgages on unsown crops, to be grown on the mortgagor's land, have been held good in a number of jurisdictions. *Briggs v. United States*, 143 U. S. 346. Also a mortgage of butter and cheese, to be made on a certain farm, has been held good. *Condemn v. Smith*, 41 Barb. 404. In these cases, it is true, the claimants against the mortgages were not purchasers for value without notice, but although this fact is material in equity, it should not affect the question at law, and the language used by the courts is commonly broad enough to cover the case of a purchaser. Moreover, such a mortgage has been maintained against a subsequent mortgagee who got possession. *Harris v. Jones*, 83 N. C. 317. On the other hand, the principal case, which is not decided on the ground that defendant was a purchaser, is supported, in refusing to extend the doctrine of potential existence beyond actually growing crops, by the decisions of several states. *Hutchinson v. Ford*, 9 Bush, 318; *Cole v. Kerr*, 19 Neb. 553. In England, also, the whole doctrine is now abolished by the Sales of Goods Act, 1893, sect. 6, subsect. 3. On principle such a lien is equitable in its nature, since the mortgagee clearly cannot acquire the legal title to a non-existent article, and the whole subject should be left to equity. Cf. *Holroyd v. Marshall*, 10 H. L. Cas. 191.

PROPERTY — WILLS — DOUBLE INHERITANCE TAX. — A father devised certain freehold estates to his son. After the execution of the will and in the lifetime of the father, the son died leaving issue which survived the father, and devising his property to trustees on certain trusts. The crown claimed an inheritance tax on the real estate from the executors both of father and of son. Held, that, as the property by the Wills Act, § 33, passed under both wills, it was subject to two inheritance taxes. *Re Scott*, 83 L. T. Rep. 613. See NOTES, p. 615.

SALES — RETENTION OF TITLE — RISK OF LOSS. — A piano was sold and delivered, and notes given for it containing a stipulation that the title should remain in the vendor until payment in full. While in the possession of the vendee the piano was accidentally destroyed. Held, that the notes need not be paid. *Bishop v. Minderhout*, 29 So. Rep. 11 (Ala.).

The decision is against the weight of authority, and incorrect on principle. Since the transaction is intended as a substitute for a sale and mortgage back, and in other respects has that effect, the risk of loss, following the analogy, should be on the vendee. *Tipp v. White*, 12 Heisk. 165; *Tufts v. Wynne*, 45 Mo. App. 42. Contra, *Randle v. Stone & Co.*, 77 Ga. 501. This rule of course should be applied only to cases where the title is held back for security, although one decision has carried it farther. *Hesselsbacher v. Ballantyne*, 28 Ont. 182. The doctrine of the principal case has led to decisions that such notes are not absolute promises to pay, and therefore not negotiable. *Slown v. McCarty*, 134 Mass. 245. But there is equal authority the other way. *Chicago Railroad Equipment Co. v. Merchants' Bank*, 136 U. S. 268. Moreover, the latter view seems preferable, even though it be held that the vendee need not pay if the goods are destroyed, for the true ground, if any, of such a decision would seem to be not the breach of a condition, but rather failure of consideration, which is an equitable defence not good against an indorsee. *Robinson v. Reynolds*, 2 Q. B. 196.

SURETYSHIP — PARTNERSHIP — NOTICE OF DISSOLUTION.—The defendant was guarantor of the debts of a firm, from which one partner withdrew without giving notice to the plaintiff. In a suit by the latter on a claim subsequently accruing, *held*, that the defendant was discharged from his guaranty. *Byers v. Hickman Grain Co.*, 84 N. W. Rep. 500 (Iowa.).

It is settled law that where there is a guaranty of partnership debts the withdrawal of any member of the firm discharges the guarantor, unless the guaranty in its terms covers the debts of the firm's successors. *Backhouse v. Hall*, 6 B. & S., 507; *Simson v. Cooke*, 8 Moore, 588. In the principal case, it is true, as no notice had been given to the plaintiff, the members of the old firm were all estopped to set up the fact of its dissolution. *Dickinson v. Dickinson*, 25 Gratt. 321; *Packer v. Hall*, 14 Allen, 532. This, however, cannot affect the result. The guarantor can be held only to the strict letter of his undertaking, which was to guarantee the debts of a certain firm, and no negligence on the part of the firm can estop the guarantor from showing the dissolution of this firm and his consequent discharge. This result was reached in another case involving the same principle. *Manhattan Gas Light Co. v. Ely*, 39 Barb. 174.

TORTS — LOOK AND LISTEN RULE — CONTRIBUTORY NEGLIGENCE.—The plaintiff failed to look before crossing defendant's car track, and was run into. The lower court charged that if a person who had looked would reasonably have thought it safe to cross, plaintiff was not contributorily negligent, and a verdict was found for the plaintiff. *Held*, that the charge was erroneous. *Dummer v. Milwaukee Ry. & Light Co.*, 84 N. W. Rep. 853 (Wis.).

Failure to look and listen has frequently been held sufficient negligence in itself to bar a recovery. *Ward v. Rochester Electric Ry. Co.*, 17 N. Y. Supp. 427. See 13 HARV. LAW REV. 226. In such cases, however, no question has been raised whether such want of care contributed to the injury. When this question is distinctly left to the jury, which finds, as here, that the negligence was not part of the cause of the accident, it seems unjustifiable to rule that as a matter of law the plaintiff was guilty of contributory negligence, since the whole theory of such negligence is based on such a relation of legal cause. *Tuff v. Warman*, 5 C. B. N. S. 573. Though certain acts may be held, by established precedent, to be negligent *per se*, by no rule or precedent can they be made a direct cause of the accident.

TRUSTS — PLEADING — SUIT AT LAW AGAINST TRUSTEE.—The plaintiff sued the defendant as trustee for an injury caused by the negligence of an employee of the trust estate. *Held*, on demurrer, that the action should have been against the defendant in his personal, not in his representative capacity. *Parmenter v. Barstow*, 47 Atl. Rep. 365 (R. I.). See NOTES, p. 608.

REVIEWS.

CONFLICT OF LAWS; or, Private International Law. By Raleigh C. Minor, Professor of Law in the University of Virginia. Boston: Little, Brown & Co. 1901. pp. lii, 575.

Owing to the ever-increasing intercourse between states having different laws, and the consequent variety of questions continually arising, conflict of laws is beginning to rank among the important branches of the law, and yet, in proportion to its importance, the number of American text-books on the subject has been surprisingly small. One may therefore predict with confidence that Mr. Minor's book on this difficult, important, and interesting topic will meet with a hearty welcome by the legal profession.

The great foundation and basic principle on which the author rests his exposition of the law is *situs*. "Every element of every transaction

known to the law has a situs somewhere, and the law of that situs will regulate and control the legal effect of that element." Accordingly, the successive parts of the work are devoted to the discussion of the situs of the person, of status, of personal property, of contracts, of torts and crimes, and of remedies, with an important introductory part setting forth the exceptions to the application of "the proper law." In spite of the stress laid on the idea of situs, no clear definition of it is given. The conception seems to be that the legal situs, which may or may not be the actual situs of a thing or transaction, is that place the law of which governs when a question arises for decision. But what that place is, and what law does govern, still remains the very problem which we must solve, and as we are not brought any nearer to its solution if we call that place situs and the law which governs "the proper law," it is difficult to discover any fundamental principle in the idea of situs. In seeking for an underlying principle, more attention might well be paid to the fact that conflict of laws, as is pointed out by Professor Dicey, deals with the recognition of rights actually acquired, *i. e.* rights which could be enforced by the sovereign of the state where they have their origin. In this view, it would follow that the law governing the acquisition of rights must ordinarily be the territorial law of that jurisdiction within which the rights are asserted to have arisen, and which controlled and could have prevented their arising. This principle of territoriality, if we may call it so, would, of course, be subject to important exceptions where by consent of all sovereigns a different rule has been established, as, for instance, in the case of status and of the inheritance of personalty. Important as these exceptions are, the principle is one which is founded on reason, and is free from the arbitrariness involved in the notion of situs. It would take care of the law as to realty, which the present author is forced to regard as an exception to his theory, and would enable us as to personalty to avoid the unsatisfactory maxim, *mobilia personam sequuntur*.

But difficulties of this kind are only in regard to theory. As an exposition of the law the treatise is very satisfactory. Inaccuracies are comparatively few. It may be noted that in the discussion of the recognition of foreign judgments *in personam*, page 187, no reference is made to the English doctrine (see *Godard v. Gray*, L. R. 6 Q. B. 139), which is, it is believed, much sounder than the view of *Hilton v. Guyot*, 159 U. S. 113. The arrangement presents the law in clear-cut outlines, and the idea of situs has served admirably as a mode of classification.

H. K.

THE LAW OF SURETYSHIP AND GUARANTY. By Darius H. Pingrey, LL. D. Albany, N. Y.: Matthew Bender. 1901. pp. xvi, 443.

There is certainly room for a book on the subject of suretyship and guaranty that will treat this difficult branch of the law in a scientific and scholarly manner. The nature of the topic and its close connection with the Roman law adapt it peculiarly to a logical exposition. This service, however, Mr. Pingrey has not attempted to render us. His object, as he himself says, is merely to state the principles of law as settled by the weight of authority, without theoretical discussion or comment upon conflicting views. This he has done concisely and clearly, and with such copious references to authorities — over 4000 cases being cited — as to render the book of considerable value to a lawyer in the preparation of

briefs ; but the absence of any presentation of the underlying principles prevents its being of much assistance to the student.

The author finds no difficulty in the view generally adopted that where the principal object of a contract is to advance some personal interest of the promisor the contract is not within the Statute of Frauds, though the debt of another is incidentally guaranteed. Yet the soundness of this rule may well be doubted, contradicting as it does the express terms of the statute, as well as giving rise to numerous inconsistencies. Testing the rule by extreme cases, it will be found that the proper remedy is in *quasi-contract* for the benefit that the promisor has received. Moreover, the law on this subject has developed strictly along *quasi-contractual* lines. On the other hand, the text adopts the view which, though believed to be sound, does not represent the weight of authority, that a contract to answer for the default of an infant is within the Statute of Frauds, on the ground that there really is a principal obligation, though a voidable one, but voidable only when the infant sets up the defence, it being personal to him. The opposite view is taken by other text-books : Brandt, *Suretyship*, § 58, note ; De Colyar, *Guarantees*, 3d ed. 97. Mr. Pingrey falls into the common error of regarding what is in reality an equitable defence as a condition implied in the contract of suretyship ; for example, he says that an employer impliedly stipulates with the surety of an employee that he will not retain the latter after a breach of duty justifying a discharge. Obviously, this was no part of the contract between the parties, but is a mere defence allowed the surety by equity on the ground of the manifest injustice of his continuing liable to a creditor who has dealt so unfairly with him.

The book, though apparently the result of considerable industry, does not evidence the thorough investigation or careful thought the task the author attempted requires. The author is further unfortunate in that the errors due to careless or incompetent proof-reading are numerous and important. Some paragraphs are wholly unintelligible ; for example, the one on page 291, beginning, "Thus, when a party releases a chattel mortgage," etc. It is rather misleading to find the text saying, page 284, "The *oral* promise to *identify* a person for becoming surety on another's bail bond, according to the *minority* of the courts, is within the Statute of Frauds, and must be *in writing*." We are left to conjecture that identify means indemnify, and minority means majority. The author's style in many places is also not altogether unexceptionable.

F. R. T.

A TREATISE ON COVENANTS WHICH RUN WITH LAND OTHER THAN COVENANTS FOR TITLE. By Henry Upson Sims. Chicago: Callaghan & Co. 1901. pp. xxxi, 287.

Covenants which run with land are an important subject of every-day use in the law of Real Property. Nevertheless, up to the present time, the only text-book devoted entirely to them has been Mr. Rawle's masterly work on Covenants for Title, which, as its name indicates, leaves untouched the large unclassified residue of covenants as to the use of land. In filling this gap Mr. Sims's present work is heartily to be welcomed, for, as Professor Gray says in the preface to his book on The Rule against Perpetuities : "In the present state of legal learning a chief need is for books on special topics, chosen with a view, not to their

utility as the subjects of convenient manuals, but to their place and importance in the general system of the law."

Mr. Sims goes into a discussion of the old common law before the Statute 32 Henry VIII. Historically he finds that the old feudal *warrantia chartæ* gave rise to express warranty, from which in turn covenants which run with land were developed. He concludes from this that no covenant should run, unless there is a grant of a corporeal or an incorporeal hereditament between the parties to the covenant at the time it is made. It is thus made impossible for a stranger to bind himself to make repairs on land for the benefit of any owner of the land, a result for which there seems no practical reason. This view, however, was taken by Lord St. Leonards, Sugden, Vend. & P. 14th ed. 585 *et seq.*; and is necessary in order to avoid being carried too far in the other direction, if we adopt, with Mr. Sims, the theory that the burden as well as the benefit should run. Mr. Sims considered this proposition, that the burden will run, both historically correct and expedient, since he regards it as desirable that the proper use of land should be regulated and insured. But, as he admits, the modern English rule is *contra*. *Hayward v. Brunswick Building Society*, 8 Q. B. D. 403. As to what covenants "touch the land," Mr. Sims refers his readers to a perusal of the cases, and concludes that no definition can be given. This seems necessary if covenants as to competing in trade, etc., are to be held to "touch the land," as in *National Bank v. Segur*, 39 N. J. L. 173. It would seem, however, that the cases *contra* represent the better view, *Thomas v. Hayward*, L. R. 4 Ex. 311; and if this is so a covenant might be said to "touch the land," when it is of value to the covenantee because of his occupation of that particular piece of land. The rule in *Spencer's Case*, that a covenant as to a thing not *in esse* will not bind the assigns unless they are named, Mr. Sims justly regards as mediæval and technical. His opinion that it will not be followed in the United States seems, however, unjustifiably optimistic, especially in view of his own citation of cases.

The arrangement of the book is, as it should be, that of a treatise, and not that of an inflated digest. The authorities are, however, exhaustively collected, and a list of cases and a copious index facilitate a ready reference to any topic. As a whole, the book presents a clear statement of the history of the subject, and, after a fair and thorough discussion of most points, works out a logical and consistent theory. Whatever, therefore, may be the correct law as to covenants which run with land, Mr. Sims's book cannot fail to stimulate thought, and thus to do much toward an intelligent and accurate understanding of that branch of the law.

R. B. S.

THE LAW AND POLICY OF ANNEXATION. With special reference to the Philippines, together with observations on the status of Cuba. By Carman F. Randolph. New York: Longmans, Green & Co. 1901. pp. xi, 226.

This book contains an interesting and timely discussion of the important problems which have confronted our country ever since the Spanish war, the most important of which are soon, we trust, to be solved by the Supreme Court. The author gives on the whole an excellent review of the situation in which we are placed with reference to the Philippines, showing by what constitutional authority we derived our title

from Spain, discussing the immediate problems which have arisen, and are every day arising, concerning the government of the islands, and considering finally the question of their ultimate disposition. With regard to the great problem as to whether the Constitution extends to our new possessions, Mr. Randolph maintains the stand taken by him in previous articles, that the Constitution applies to the Philippine Islands and to Porto Rico with the same force that it exerts over the original states, and must continue to apply unless another amendment is added to it. He analyzes carefully and attempts to meet the arguments of those who think that in dealing with these territories we are not bound by constitutional limitations, but his discussion, though persuasive, is not convincing to the legal mind. Considering the importance of the subject, and the fact that the rest of the work is largely based on the assumption that he has proved his proposition, it is to be regretted that the author did not see fit to treat this matter more thoroughly and at greater length. His discussion here states his opinions rather more briefly than in his earlier article on the Constitutional Aspects of Annexation, in 12 *HARVARD LAW REVIEW*, 291.

Assuming, then, that the Constitution does extend to the Philippines, the author goes on to examine the results that would follow from applying it, and attempts to prove that they would be by no means so disastrous as is often imagined. An interesting chapter deals with the methods by which we must govern the islands. Mr. Randolph attacks the usurpation of legislative power by the President, and contends that Congress alone has had such power since the termination of the war with Spain. He expounds the limits within which Congress must act, and the extent to which the old law of the islands should be allowed to continue. Having discussed these more immediate problems, the treatise deals with the legality and feasibility of alienating the Philippines. The author contends that we have the constitutional power to withdraw our sovereignty from the islands, insists that this is a desirable result for reasons commercial, moral, and political, and considers the most feasible plan to be the establishment of an American protectorate. The nature of such a protectorate he discusses, and illustrates in an appendix by an interesting collection of documents relating to various protectorates established by Germany, France, and England. In another appendix a valuable collection of documents relating to the Spanish war appears, and the book also contains a reprint from the *Yale Law Journal* of an article on the status of Cuba.

On the whole, this book is of distinct value, especially from a popular standpoint, giving a clear and not too technical review of the important topics with which it deals. It cannot fail to interest and instruct, even though the reader may not agree with all of its views. L. P. M.

We have also received:—

THE LAW OF TORTS. By Melville M. Bigelow. Seventh edition. Boston: Little, Brown & Co. 1901. pp. xxxi, 438. The previous editions of Professor Bigelow's book have been so widely known and appreciated that it is sufficient for us to notice the changes made in the present volume. While the body of the book remains substan-

tially the same, several additions have been made. The most interesting and suggestive is an amplification of the chapter on "Malicious Interference with Contract," in the light of recent decisions. The subject is now treated in two chapters, the first entitled "Maliciously Procuring Refusal to Contract," the second, "Procuring Breach of Contract." The author accepts, though with some hesitation, the rule that no action lies for procuring a refusal to contract, when wrongful means are not employed, although the act is inspired solely by a desire to injure. Nor does he think that the fact of combination should make any difference unless resort be had to unlawful means. Where an actual breach of contract is procured, however, Professor Bigelow considers that liability should result, if not properly from the violation of the contract right, which he believes is hardly distinguishable in this regard from any other right, at least on grounds of public policy. As the present is one of the first text-books on the law of torts published since the decision in *Allen v. Flood*, [1898] App. Cas. 1, the discussion which that case provokes is especially interesting. There have likewise been added two chapters to the section on negligence, one on "Independent Contractors" and kindred subjects, and one on "Completion of Work." By these additions the book has been brought fairly to cover the entire subject of torts, as was originally planned, a consummation that previous editions have been gradually approaching. While the work is short and therefore for many purposes necessarily inadequate, its lucid style and concise definitions make it exceedingly valuable for the student.

THE LEGAL PROPERTY RELATIONS OF MARRIED PARTIES. By Isidor Loeb. New York: The Columbia University Press. 1900. pp. 197. This book is, as its sub-title announces, a study in comparative legislation, belonging to the department of political science rather than to that of law, as usually understood. It deals chiefly with the various matrimonial property systems in force in the United States and the principal countries of Europe. The author describes the leading features of each system, indicates the advantages and disadvantages of community property in its various forms, separate property, marital administration and usufruct, and the dowry system; and discusses the comparative importance and the influence upon legislation in different countries, of such conflicting considerations as the maintenance of equality and independence in the marriage relation, the preservation of the unity of the family, and the protection of the interests of third persons. In general, however, the treatment is instructive rather than argumentative, furnishing an extensive enumeration of the provisions of various codes and the causes which led to their adoption. The effects of marriage upon legal capacity, and the subject of the succession of married parties, are treated in a similar manner. The work appears to have been done thoroughly, accurately, and with great industry. There is no attempt to describe the law of any one country in exhaustive detail, and it is to the student of sociology and political science that the book mainly appeals. Yet it is also not without interest for the lawyer who prizes the breadth of thought to be derived from familiarity with systems of law other than his own.

NEWFOUNDLAND IN 1900. A Treatise of the Geography, Natural Resources, and History of the Island, Embracing an Account of Recent

and Present Large Material Movements. Finely Illustrated with Maps and Half-tone Engravings. New York: The South Publishing Co. 1900. Pp. 187.

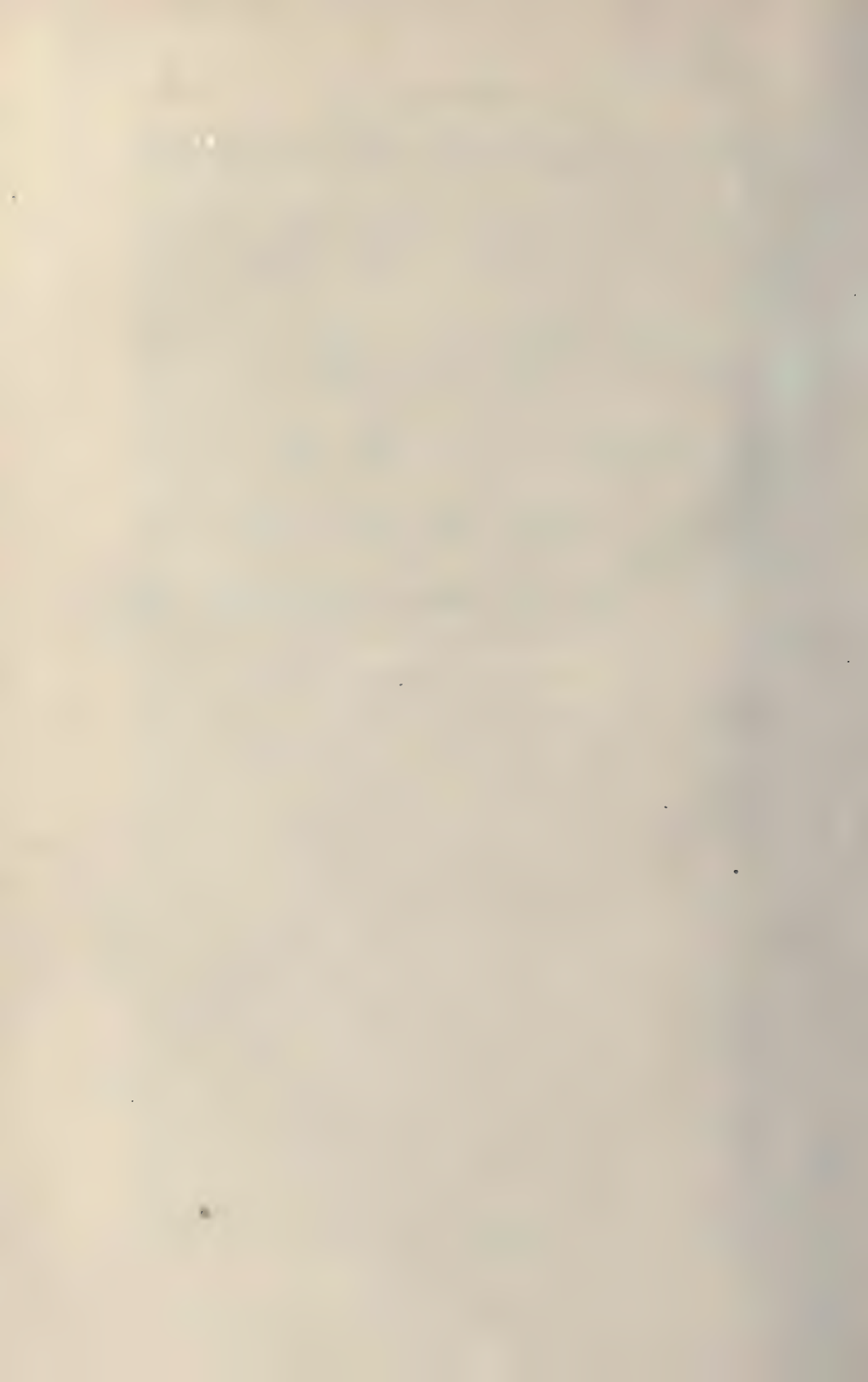
L'ORGANISATION JUDICIAIRE DE NEW-YORK AU XVII^e SIÈCLE. LES PREMIERS COLONS ET LA FONDATION DE NEW ROCHELLE. Par Emile Stocquart, avocat à la Cour d'Appel de Bruxelles. Bruxelles: Alliance Typographique. 1900. pp. 22.

REPORT OF THE TWENTY-THIRD ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION. Held at Saratoga Springs, New York, August 29, 30, and 31, 1900. Philadelphia: Dando Printing and Publishing Co. pp. 682.

TRADE UNION LAW AND CASES. By Herman Cohen and George Howell. London: Sweet & Maxwell, Limited. 1901. pp. xiii, 250. *Review will follow.*

AN EPITOME OF PERSONAL PROPERTY LAW. By W. H. Hastings Kelke, M. A. London: Sweet & Maxwell, Limited. 1901. pp. xv, 144. *Review will follow.*

AN EPITOME OF ROMAN LAW. By W. H. Hastings Kelke, M. A. London: Sweet & Maxwell, Limited. 1901. pp. vi, 268. *Review will follow.*



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